37894

STANLEY BARNACKI,

Plaintiff - Appellee,

v.

CRANE CO., a Corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

284 I.A. 641

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Superior Court of Cook County in favor of plaintiff, for the sum of $20,000.00. As stated by plaintiff in his brief filed herein, the action is brought under and is based upon Section 1 of the Occupational Diseases Act, which provides that:

> "Every employer of labor in this State, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employees to the danger of illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment, shall, for the protection of all employees engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." Cahill's Stat. 1933, chap. 48, p. 1375.

In Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, after an exhaustive review of the cases on the subject, the Supreme Court held as follows:

> "We are of the opinion that section 1 of the Occupational Diseases Act violates article 3 and section 2 of article 2 of the constitution of this State and the fourteenth amendment to the Federal Constitution."

See also Parks v. Libby-Owens-Ford Glass Co., 360 Ill. 130; Navarro v. Illinois Steel Co., 360 Ill. 483; Vallat v. Radium Dial Co., 350 Ill. 407; Sullivant v. Hillside Fluor Spar Mines, 360 Ill. 607, and Keslick v. Williams Oil-O-Matic Corp., 360 Ill. 553. The judgment herein was entered prior to these decisions.

37294

STANLEY BORACKI,	APPEAL FROM
Plaintiff - Appellee,	
v.	EXECUTION COURT
OWENS CO., a Corporation,	COOK COUNTY.
Defendant - Appellant.	

254 I.A. 641

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Superior Court of Cook County in favor of plaintiff, for the sum of $20,000.00. As stated by plaintiff in his brief filed herein, the action is brought under and is based upon Section 1 of the Occupational Diseases Act, which provides that:

> "Every employer of labor in this state, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employees to the danger of illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment, shall, for the protection of all employees engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." Smith's Stat. 1957, chap. 48, . 1279.

In Bosnjakovich v. Thomson & Taylor Co., 300 Ill. 180, after an exhaustive review of the cases on the subject, the Supreme Court held as follows:

> "We are of the opinion that section 1 of the Occupational Diseases Act violates article 3 and section 2 of article 2 of the constitution of this State and the fourteenth amendment to the federal constitution."

See also Jones v. Libby-Owens-Ford Glass Co., 380 Ill. 130; Mumford v. Illinois Steel Co., 300 Ill. 488; Valley v. Illinois Steel Co., 330 Ill. 407; Sullivant v. Illinois Glass Mfg. Co., 330 Ill. 407, and Kowalek v. Williams Oil-O-Matic Corp., 400 Ill. [illegible]. The judgment herein was entered prior to these decisions.

In C. W. & V. Coal Co., v. The People, 214 Ill. 431, the Supreme Court quoted with approval the case of Norton v. Shelby County, 118 U. S. 425, where it is said:

> "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

See also the case of Board of Highway Commissioners v. City of Bloomington, 253 Ill. 164, as follows:

> "The law is universal that an unconstitutional law confers no right, imposes no duty and affords no protection."

In view of the fact that the cause of action herein, and the judgment of the court, are based upon an act of the General Assembly which has been declared unconstitutional and void, the judgment is void, and it is, therefore, reversed.

REVERSED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

In G. W. & V. Coal Co., v. The People, 214 Ill. 421, the Supreme Court quoted with approval the case of Barton v. Shelby County, 112 U. S. 488, where it is said:

> "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

See also the case of Board of Highway Commissioners v. City of Bloomington, 252 Ill. 164, as follows:

> "The law is universal that an unconstitutional law confers no right, imposes no duty and affords no protection."

In view of the fact that the cause of action herein, and the judgment of the court, are based upon an act of the General Assembly which has been declared unconstitutional and void, the judgment is void, and it is, therefore, reversed.

REVERSED.

HEBEL, J., AND DENIS E. SULLIVAN, J., DISSENT.

37915

PEOPLE OF THE STATE OF ILLINOIS, etc., ex rel. ALBERT F. ALWARD, Plaintiff - Appellee, v. RICHARD J. COLLINS, JOSEPH P. GEARY, and Albert O. Anderson, Civil Service Commissioners Comprising the Civil Service Commission of the City of Chicago, and BOARD OF EDUCATION OF THE CITY OF CHICAGO, JAMES B. McCAHEY, President of the Board of Education of the City of Chicago; Ernst Buehler, Vice-President of the Board of Education of the City of Chicago; PAUL DRYMALSKI, CHARLES W. FRY, WILLIAM D. Mc JUNKIN, JOSEPH J. SALAT, HARRY W. SOLOMON, JOSEPH P. SAVAGE, ANDREW JACKSON, MRS. W. S. HEFFERAN and IRWIN N. WALKER, Members of the Board of Education of the City of Chicago, HOWARD PL SAVAGE, Business Manager of the Board of Education of the City of Chicago, and JOHN C. CHRISTENSEN, Architect of the Board of Education of the City of Chicago, Defendants - Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY

284 I.A. 64

284 I.A. 641

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, entered on July 5th, 1934, directing that a writ of mandamus issue, commanding defendants, and each of them "to reinstate the petitioner, Albert F. Alward, in the position of architectural engineer, of which he was deprived by the respondents by the division of his time and period of his employment with non-Civil Service employees who had no right to the position, and to employ the petitioner full time in his position so long as he is entitled to the position, and is not laid off by the respondents, and that the respondents perform all formal acts necessary to effect the same, as required by law."

The petition recites, among other things, that the petitioner had been duly certified to employment by the Board of Education of the City of Chicago in the position of architectural engineer, in which position he had been employed, and at the time

PEOPLE OF THE STATE OF ILLINOIS, etc.,
ex rel. ALBERT F. ELWING,

Plaintiff - Appellee,

v.

RICHARD J. COLLINS, JOHNSON P. CLARK, and
Albert G. Anderson, Civil Service Com-
missioners constituting the Civil Service
Commission of the City of Chicago, and
BOARD OF EDUCATION OF THE CITY OF CHICAGO,
JAMES H. MCGAHEY, President of the Board
of Education of the City of Chicago;
Ernest Bugbler, Vice-President of the Board
of Education of the City of Chicago; PAUL
DRYMALSKI, CHARLES K. FRY, WILLIAM H. MC
JUNKIN, JOSEPH J. SALAT, HARRY S. SOLOMON,
JOSEPH P. DAVAGE, ANDREW JACKSON, MRS. V.
S. HUTTMAN and LYDIA K. SALKIN, members
of the Board of Education of the City of
Chicago, HOWARD P. DAVAGE, Business Manager
of the Board of Education of the City of
Chicago, and JOHN C. CHRISTENSEN, Architect
of the Board of Education of the City of
Chicago,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

284 I.A. 641

284 I.A. 641

MR. PRESIDING JUSTICE MAIL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, entered on July 8th, 1954, directing that a writ of mandamus issue, commanding defendants, and each of them "to reinstate the petitioner, Albert F. Elwing, in the position of architectural engineer, of which he was deprived by the respondents by the division of his time and period of his employment with non-civil Service employees who had no right to the position, and to employ the petitioner full time in his position so long as he is entitled to the position, and is not laid off by the respondents, and that the respondents perform all formal acts necessary to effect the same, as required by law."

The petition recites, among other things, that the petitioner had been duly certified to employment by the Board of Education of the City of Chicago in the position of architectural engineer, in which position he had been employed, and at the time

of the filing of the petition, was employed by the Board of Education of the City of Chicago; that he was number one on the eligible list for such position, and that he held such position by reason of length of service and his seniority in the service; that appropriations had been made for his full salary for the years 1932 and 1933; that on or about August 1st, 1932, the petitioner was informed that he and all other employees of the Board of Education would be compelled to submit to a division of their time so that more persons would receive employment, and for the sake of economy; that the petitioner was laid off on April 1st, 1933, and remained unemployed until April 15th, 1933; that on April 15th, 1933, he was again placed in active employment, but was informed he would only be employed until May 1st, 1933, and that during this time, other persons received the employment and pay for the time for which he was laid off. The prayer of the petition is that a writ of mandamus issue, commanding the defendants, members of the Civil Service Commission of the City of Chicago, John C. Christensen, Architect of the Board of Education, and Howard P. Savage, Business Manager of the Board of Education, to employ and certify for employment as Civil Service architectural engineer the petitioner continuously so long as there is work available for such position in the order of which the name of said petitioner appears on the Register of the Civil Service architectural engineers.

Oral argument of the cause was had before this court, and, in the course of this argument, inquiry was made of the petitioner's counsel as to whether or not petitioner had been reinstated to his full time position to which he made claim, and had been restored to his full salary, prior to the order for the writ of mandamus, and

of the filing of the petition, was employed by the board of education of the City of Chicago; that he was number one on the eligible list for such position, and that he held such position by reason of length of service and his seniority in the service; that appropriations had been made for his full salary for the years 1932 and 1933; that on or about August 1st, 1932, the petitioner was informed that he and all other employees of the board of education would be compelled to submit to a division of their time so that more persons would receive employment, and for the sake of economy; that the petitioner was laid off on April 1st, 1933, and remained unemployed until April 15th, 1933; that on April 15th, 1933, he was again placed in active employment, but was informed he would only be employed until May 1st, 1933, and that during this time, other persons received the employment and pay for the time for which he was laid off. The prayer of the petition is that a writ of mandamus issue, commanding the defendants, members of the Civil Service Commission of the City of Chicago, John G. Christensen, architect of the board of Education, and Howard A. Savage, business manager of the Board of Education, to employ and certify for employment as Civil Service architectural engineer the petitioner continuously so long as there is work available for such position in the order of which the name of said petitioner appears on the register of the Civil Service architectural engineers.

Oral argument of the cause was had before this court, and, in the course of this argument, inquiry was made of the petitioner's counsel as to whether or not petitioner has been reinstated to his full time position to which he made at law, and had been restored to his full salary, prior to the order for the writ of mandamus, and

whether or not this fact appeared of record in the cause. To this inquiry petitioner's counsel replied that petitioner had been so restored, and that the record indicated this fact.

In view of the fact that all that could be accomplished by the writ of mandamus had been voluntarily done by the respondents, there was no occasion for the issuing of the writ. Therefore, the order of the Circuit Court is reversed.

REVERSED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

whether or not this fact appeared of record in the cause. To this inquiry petitioner's counsel replied that petitioner had been so restored, and that the record indicated this fact.

In view of the fact that all that could be accomplished by the writ of mandamus had been voluntarily done by the respondents, there was no occasion for the issuing of the writ. Therefore, the order of the circuit court is reversed.

REVERSED.

MERRI, J. AND DENIS E. SULLIVAN, J. CONCUR.

37969

MELLICENT MARTIN,
(Plaintiff) Appellee,
v.
ROSS & BROWNE, a Co-partnership,
(Defendants) Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

284 I.A. 641

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for plaintiff, in a suit brought by plaintiff against defendant for commissions alleged to have been earned by her in the leasing of an apartment at 2430 Lakeview Avenue, Chicago. Both plaintiff and defendant are licensed real estate brokers in the city of Chicago.

It is the contention of plaintiff, as expressed in her statement of claim, that about December 10th, 1933, defendant requested plaintiff to procure a tenant for an apartment in the premises known as 2430 Lakeview Avenue, Chicago; that in compliance with this request of defendant, plaintiff did procure a tenant for such apartment, and that thereupon with full knowledge of the fact that the apartment had been submitted to the tenant by plaintiff, and that plaintiff had so procured the tenant for such apartment, that the usual and customary commission for such service was due her, and that defendant owed her the sum of $583.30, and that they refused to pay plaintiff the sums due her. Defendants deny that they at any time requested plaintiff to procure a tenant for this apartment, but allege that plaintiff, among many other real estate brokers in the city of Chicago, was furnished by defendant from time to time with lists of apartments and other properties for rent, which had been listed with defendants, with the idea that the persons to whom these lists were sent, might procure tenants for these properties. Defendants insist, however, that they only agreed to pay a

37500

MELICENT MARTIN, (Plaintiff) Appellee,	
v.	
ROSE & BROWER, a Co-partnership, (Defendants) Appellants.	

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

264 I.A. 641

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in a suit brought by plaintiff against defendant for commissions alleged to have been earned by her in the leasing of an apartment at 2420 Lakeview Avenue, Chicago. Both plaintiff and defendant are licensed real estate brokers in the city of Chicago.

It is the contention of plaintiff, as expressed in her statement of claim, that about December 15th, 1923, defendant requested plaintiff to procure a tenant for an apartment in the premises known as 2420 Lakeview Avenue, Chicago; that in compliance with this request of defendant, plaintiff did procure a tenant for such apartment, and that thereupon with full knowledge of the fact that the apartment had been submitted to the tenant by plaintiff, and that plaintiff had so procured the tenant for such apartment, that the usual and customary commission for such service was due her, and that defendant owed her the sum of $250.00, and that they refused to pay plaintiff the sums due her. Defendants deny that they at any time requested plaintiff to procure a tenant for this apartment, but allege that plaintiff, among many other real estate brokers in the city of Chicago, was furnished by defendant from time to time with lists of apartments and other properties for rent, which had been listed with defendants, with the idea that the persons to whom these lists were sent, might procure tenants for these properties. Defendants insist, however, that they only agreed to pay a

commission to the broker presenting an application and check of the proposed tenant, the application to be approved and the check to be accepted by defendants, should they conclude to execute a lease for such property. Defendants deny that plaintiff presented any such application or check on any deal for the rental of this apartment at 2430 Lakeview Avenue, Chicago.

The record indicates that shortly prior to the times in question, plaintiff, among other real estate brokers, received from defendant certain leasing sheets, or lists, each of which contained the following recitals:

> "Commission paid to brokers presenting application andcheck on its acceptance by this office."
> "All applications submitted must be accompanied by the first months' rent. When, as and if such application is accepted, commission will be paid only to the broker consummating the deal."

In addition to plaintiff, more than one hundred real estate brokers in Chicago, received these sheets. The person to whom the apartment in question was rented was one Edward Morris, to whom the lease was made in the office of defendants. The commission for the renting was paid to defendants.

Plaintiff, alone, testified in support of her claim. A careful examination of the abstract indicates that such testimony is confusing and contradictory, but, as we make it out, it is, in substance, as follows: that the list, as set forth in defendants' affidavit of merits, with the recitals contained therein, was sent to plaintiff by defendants and was dated October 1st, 1933, and received by plaintiff on October 10th or 11th, 1933; that on October 4th, 1933, she called up the wife of Morris, who subsequently rented the apartment in question by telephone, and suggested to Mrs. Morris that she lease the apartment at 2430 Lakeview Avenue; that she first saw Mrs. Morris on November 12th, 1933, and that she again talked to Mrs. Morris on October 23rd, 1933; that on November 28th, 1933,

commission to the broker presenting an application and check of the proposed tenant, the application to be approved and the check to be accepted by defendants, should they continue to execute a lease for such property. Defendants deny that plaintiff presented any such application or check on my lease for the rental of this apartment at 3430 Lakeview Avenue, Chicago.

The record indicates that shortly prior to the times in question, plaintiff, among other real estate brokers, received from defendant certain leasing sheets, or lists, each of which contained the following recitals:

> "Commission paid to brokers presenting application and check on the premises by this office."
>
> "All applicants must be accompanied by the tenant. When, as and if such application is accepted, commission will be paid only to the broker consummating the deal."

In addition to plaintiff, more than one hundred real estate brokers in Chicago, received these sheets. The person to whom the apartment in question was rented was one Edward Morris, to whom the lease was made in the office of defendants. The commission for the renting was paid to defendants.

Plaintiff, alone, testified in support of her claim. A careful examination of the abstract indicates that such testimony is confusing and contradictory, but, as we make it out, it is, in substance, as follows: that the list, as set forth in defendants' affidavit of merits, with the recitals contained therein, was sent to plaintiff by defendants and a dated October 1st, 1953, and received by plaintiff on October 10th or 11th, 1953; that on October 4th, 1953, she called up the wife of Morris, who subsequently rented the apartment in question by telephone, and suggested to Mrs. Morris that she lease the apartment at 3430 Lakeview Avenue; that she first saw Mrs. Morris on November 11th, 1953, and that she again talked to Mrs. Morris on October 28th, 1953; that on November 4th, 1953,

she saw Mrs. Morris at her, plaintiff's, office, and that she saw her again about December 12th of that year; that on January 9th, 1934, she showed Mrs. Morris the apartment in question; that in the interim, she had showed Mrs. Morris one or two other apartments; that on January 8th, 1934, she talked over the telephone to a representative of the defendant about the price at which this apartment could be rented; that on January 21st, 1934, Mrs. Morris told the plaintiff that she would take the apartment and pay $6,000 a year for it; that on January 26th, 1934, she learned that the apartment had been rented to the Morrises; that she did not see the Morrises between this date and February 1st, 1934, nor did she have any communication with them. Plaintiff further testified, to the effect that at the time she took Mrs. Morris to the apartment to show it to her, that she gave the name of the prospective tenant, or client, as plaintiff terms it, to the doorman at the entrance of the apartment, and her claim is based on the alleged fact that this doorman communicated the name of the prospective tenant to the defendants, and that they thereupon sought out the Morrises and made the lease directly to them, thus attempting to cut plaintiff out of her earned commission.

Defendants insist that plaintiff not only did not make the deal for the apartment in question, but insist that she was attempting to rent the Morrises another apartment for another brokerage firm, and in support of such contention, defendants offered in evidence the following documents, after they had been identified by plaintiff as having been written by her:

"January 22d, 1934.

Mr. Edward Morris,
38 S. Dearborn St.,
Chicago

My dear Mr. Morris:

Relative to the apartment in 1420 Lake Shore Drive, Mr. Arthur Wirtz is under the impression that Mr. Connell made no definite commitment to you on a rental figure of

she saw Mrs. Morris at her, plaintiff's, office, and that she saw her again about December 15th of that year; that on January 9th, 1924, she showed Mrs. Morris the apartment in question; that in the interim, she had showed Mrs. Morris one or two other apartments; that on January 8th, 1924, she talked over the telephone to a representative of the defendant about the price at which this apartment could be rented; that on January 31st, 1924, Mrs. Morris told the plaintiff that she would take the apartment and pay $8,000 a year for it; that on January 30th, 1924, she learned that the apartment had been rented to the Morrises; that she did not see the Morrises between this date and February 1st, 1924, nor did she have any communication with them. Plaintiff further testified, to the effect that at the time she took Mrs. Morris to the apartment to show it to her, that she gave the name of the prospective tenant, or client, as plaintiff terms it, to the doorman at the entrance of the apartment, and her claim is based on the alleged fact that this doorman communicated the name of the prospective tenant to the defendants, and that they thereupon sought out the Morrises and made the lease directly to them, thus attempting to cut plaintiff out of her earned commission.

Defendants insist that plaintiff not only did not make the deal for the apartment in question, but insist that she was attempting to rent the Morrises another apartment for another brokerage fee, and in support of such contention, defendants offered in evidence the following documents, after they had been identified by plaintiff as having been written by her:

"January 23d, 1924.

Mr. Edward Morris,
32 S. Dearborn St.,
Chicago

My dear Mr. Morris:

Relative to the apartment in 1620 Lake Shore Drive, Mr. Arthur Hirts is under the impression that Mr. Donnell made no definite commitment to you on a rental figure of

five hundred dollars a month. Mr. Wirtz has been informed that Mr. Connell was merely making an offer which might or might not be accepted by the owners of the building.

If you will be willing to see Mr. Wirtz, and he is convinced and knows from your own lips that Mr. Connell did definitely state that five hundred dollars would be accepted, Mr. Wirtz will back up this action on the part of his broker. This is an unfortunate occurrence but wont you please give the other side a chance to talk it over with you?

Such conduct is not a common practice in the lease transactions of this building, and there are a great many very astute and wise men who have signed up for these apartments. Trusting that you will reconsider your decision and see Mr. Wirtz, and sincerely hoping that the undersigned may directly represent you at some future time, I am

Very truly yours,

Mellicent Martin"

"1.31.34

Mr. Edward Morris,
38 S. Dearborn St.,
Chicago

My dear Mr. Morris:

Not having been able to find out from anyone whether or not you have made a deal with Mr. Wirtz in 1420 Lake ShoreDrive, I am taking the liberty of submitting another apartment to you, in 1342 Lake Shore Drive - the 23d floor - which has one more bedroom than the regular floor plan.-

This apartment, which we have leased furnished to Mrs. Max Falk, is owned by the Lytton estate and was designed by the late Mr. Lytton for his personal use. The Falks are paying $400 a month furnished, and if Mrs. Morris would like to see it, she can either call our office, or call Miss Falk, Superior 1052. The furniture can also be removed if you prefer. If you have closed for an apartment, will you please ask your secretary to tell me, because I am still trying to find something interesting to submit. Expressing regret that thru our office, you have had so much trouble, so much annoyance, I am

Very truly yours,

Mellicent Martin"

"February 6th, 1934.

Mr. Edward Morris,
38 S. Dearborn St.,
Chicago

My dear Mr. Morris:

The article was given to the Tribune only after I was told that you had signed an application, terms had been agreed upon, and that you were to sign the lease at two

five hundred dollars a month. Mr. Ritts has been informed that Mr. Connell was merely making an offer which might or might not be accepted by the owners of the building.

If you will be willing to see Mr. Ritts, and he is convinced and shows from your own lips that Mr. Connell did definitely state that five hundred dollars would be accepted, Mr. Ritts will back up this action on the part of his broker. This is an unfortunate occurrence but most you please give the other side a chance to talk it over with you?

Such conduct is not a common practice in the leasing transactions of this building, and there are a great many very astute and wise men who have signed up for these apartments. Trusting that you will reconsider your decision and see Mr. Ritts, and sincerely hoping that the undersigned may directly represent you at some future time, I am

Very truly yours,

Milliken Martin

"1.31.34

Mr. Edward Morris,
33 S. Dearborn St.,
Chicago

My dear Mr. Morris:

Not having been able to find out from anyone whether or not you have made a deal with Mr. Ritts in 1890 Lake Shoreditve, I am taking the liberty of submitting another apartment to you, in 1400 Lake Shore Drive - the 23d floor - which has one more bedroom than the regular floor plan.

This apartment, which we have leased furnished to Mrs. Max Fain, is owned by the Ryttan estate and was designed by the late Mr. Ryttan for his personal use. The Fains are paying $400 a month furnished, and if Mr. Morris would like to see it, one can either call our office, or call Miss Fain, superior 1000. The furniture can also be removed if you prefer. If you have closed for an apartment, will you please ask your secretary to tell me, because I am still trying to find something interesting to submit. Expressing regret that thru our office, you have had so much trouble, so much annoyance, I am

Very truly yours,

Milliken Martin

"February 6th, 1934.

Mr. Edward Morris,
33 S. Dearborn St.,
Chicago

My dear Mr. Morris:

The article was given to the Tribune only after I was told that you had signed an application, terms had been agreed upon, and that you were to sign the lease at two

o'clock. (Friday). In our office applications are equivalent to the signing of a lease, and I regret that you should have so strenuously objected to a dignified notice in the real estate section. It is quite in order to have notices of all prominent leases in the newspapers. It helps promote a better real estate market.

I cannot see why you, a very fair man, would take serious exception to our office on this account, for you must know how deeply affected I was over the outcome of the negotiations for the apartment in 1420 Lake Shore Drive. In fact I went out of my way and realm as broker to try to make this lease, altho our remuneration would only have been one half the customary amount.

So please in all fairness will you be kind enough to protect me to the extent of a letter either to Ross & Browne or to me personally stating that you first saw the apartment thru the efforts of this office? It would have been kinder if you would have told me that you wanted to negotiate direct for this apartment. All we ask is the customary consideration.

Very truly yours,

Mellicent Martin"

To the admission of these documents, plaintiff's counsel objected. The court sustained the objection, and they were not received. These documents are relevant and competent as tending to sustain defendants' defense, and the court erred in rejecting them.

Sarah Curran, an employe of the defendants, with whom plaintiff testified that she had communicated regarding the renting of the premises by the Morrises, testified that the first time she ever knew of the Morrises being prospective tenants for any apartment, was on January 11th or 12th, 1934, and that she received their name through a Mr. McFadden, an employe of defendant; that McFadden told the witness he had received the name through a man at 1242 Lake Shore Drive; that she had no conversation with the plaintiff on January 6th, 1934, regarding the proposed leasing of the apartment at 2430 Lakeview Avenue to the Morrises; that she never told plaintiff that the rental price of the apartment in question was $500 per month; that she never had any conversation with plaintiff about her commission; that plaintiff did not tell the witness at any time that she was dealing with

o'clock. (Friday). In our office applications are equivalent to the signing of a lease, and I regret that you should have so strenuously objected to a digitified notice in the real estate section. It is quite in order to have notices of all prominent leases in the newspapers. It helps promote a better real estate market.

I cannot see why you, a very fair man, would take serious exception to our office on this account, for you must know how deeply affected I was over the outcome of the negotiations for the apartment in 1620 Lake Shore Drive. In that I went out of my way and really as broker to try to make this lease, altho our remuneration would only have been one half the customary amount.

To please in all fairness will you be kind enough to protest me to the extent of a letter either to Ross & Brooks or to me personally stating that you first saw the apartment thru the efforts of this office? It would have been kinder if you would have told me that you wanted to negotiate direct for this apartment. All we ask is the customary consideration.

Very truly yours,

Mellicent Martin"

To the admission of these documents, plaintiff's counsel objected. The court overruled the objection, and they were not received. These documents are relevant and competent as tending to sustain defendants' defense, and the court erred in rejecting them.

Sarah Curran, an employe of the defendants, with whom plaintiff testified that she had communicated regarding the renting of the premises by the Morrisses, testified that the first time she ever knew of the Morrisses being prospective tenants for any apartment, was on January 11th or 12th, 1924, and that she received their name through Mr. Moredden, an employe of defendant; that Moredden told the witness he had received the name through a man at 1620 Lake Shore Drive; that she had no conversation with the plaintiff on January 6th, 1924, regarding the proposed leasing of the apartment at 2620 Lakeview Avenue to the Morrisses; that she never told plaintiff that the rental price of the apartment in question was $800 per month; that she never had any conversation with plaintiff about her commission; that plaintiff did not tell the witness at any time that she was dealing with

the Morrises regarding the renting of the premises in question.

John McFadden, an employe and building manager, of the defendants, testified to the effect that plaintiff never presented to defendants an application with reference to the renting of 2430 Lakeview Avenue, and that he never had any conversation with plaintiff with respect to the commission on this apartment. McFadden further testified that he knew Mr. and Mrs. Morris, the tenants mentioned; that he first met them on January 30th, 1934, at 1200 Lake Shore Drive, but that he was in communication with Mrs. Morris on January 12th, 1934. He was asked what he and Mrs. Morris said at this meeting, to which objection was made and the objection was sustained; that he next met them on January 21st, at 1300 Lake Shore Drive. He asked as to conversations had at this meeting, and the court again sustained objection to any conversation between the witness and the Morrises. The witness further testified that he saw Mrs. Morris on January 24th, 1934, and was asked the question as to what was said and done at that meeting, to which question objection was sustained. He stated that he saw them again on January 26th at 1100 Lake Shore Drive, and was again asked the question as to conversation between the Morrises and himself with reference to renting the apartment in question, to which objection was made and again sustained; that he next saw them on January 27th, at 1100 Lake Shore Drive, and was again asked the question regarding conversation as to the renting of the premises in question, to which objection was made and sustained.

Defendants then offered to prove by McFadden that "on January 30th, and on days subsequent thereto, and up to February 2nd, 1934, he had several meetings and talks with Mrs. Morris with respect to the apartment at 2430 Lakeview Avenue, and that Mr. Morris made several offers for the apartment at prices which were unacceptable

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John McFadden, an employe and building manager, of the defendants, testified to the effect that plaintiff never presented to defendants an application with reference to the renting of 2420 Lakeview Avenue, and that he never had any conversation with plaintiff with respect to the occupation on this apartment. McFadden further testified that he knew Mr. and Mrs. Morris, the tenants mentioned; that he first met them on January 20th, 1924, at 1200 Lake Shore Drive, but that he was in communication with Mrs. Morris on January 18th, 1924. He was asked what he and Mrs. Morris said at this meeting, to which objection was made and the objection was sustained; that he next met them on January 21st, at 1200 Lake Shore Drive. He asked as to conversations had at this meeting, and the court again sustained objection to any conversation between the witness and the Morrises. The witness further testified that he saw Mrs. Morris on January 24th, 1924, and was asked the question as to what was said and done at that meeting, to which question objection was sustained. He stated that he saw them again on January 25th at 1200 Lake Shore Drive, and was again asked the question as to conversation between the Morrises and himself with reference to renting the apartment in question, to which objection was made and again sustained; that he next saw them on January 27th, at 1200 Lake Shore Drive, and was again asked the question regarding conversation as to the renting of the premises in question, to which objection was made and sustained.

Defendants then offered to prove by witness that "on January 20th, and on days subsequent thereto, and up to February 2nd, 1924, he had several meetings and talks with Mrs. Morris with respect to the apartment at 2420 Lakeview Avenue, and that Mr. Morris made several offers for the apartment at prices which were unacceptable

to the owners of the building; that his first offer was $450 a month, and that it was not until the third offer was made by Mr. Morris that the price of $540 a month was reached." Plaintiff objected to this offer, and the court sustained the objection.

Daniel Connell, an employe of a real estate brokerage firm named Wirtz, Haynie & Ehrat, was produced as a witness by the defendant. He testified that he knew the plaintiff in the case, and that on January 15th or 16th, 1934, she came to him and was taken to a building known as 1420 Lake Shore Drive. He was asked this question by defendants' counsel: "What did Mellicent Martin say to you, and what did you say to her?" Objection was made to this question, and the objection was sustained. Counsel for defendant thereupon offered to prove by this witness that the plaintiff, Mellicent Martin, caused Edward Morris to sign an application for an apartment at 1420 Lake Shore Drive, which is an apartment not managed and operated by the defendants herein, and caused him to present a check for the first two month's rent on this apartment, and that this was done on or about January 21st, 1934, this being the very day upon which the plaintiff testified that Mrs. Morris told her she was going to take the apartment at 2430 Lakeview Avenue. Defendant offered this evidence as bearing on the issue as to whether or not plaintiff was the procuring agent of the lease in controversy, and that it would show that plaintiff not only did not procure the lease in controversy, but on the contrary, that she used her best efforts to make a lease to them of the apartment at 1420 Lake Shore Drive. To this offer, objection was made, and the objection was sustained by the court. In this ruling, we are of the opinion that the court was in error.

From all of the confusing testimony of the plaintiff, we are unable to arrive at the conclusion that it was she who negotiated

to the owners of the building; that his first offer was $450 a month, and that it was not until the third offer was made by Mr. Morris that the price of $540 a month was reached." Plaintiff objected to this offer, and the court sustained the objection.

Daniel Connell, an employe of a real estate brokerage firm named Hirth, Bryson & Kurz, was produced as a witness by the defendant. He testified that he knew the plaintiff in the case, and that on January 15th or 16th, 1934, she came to him and was taken to a building known as 1430 Lake Shore Drive. He was asked this question by defendants' counsel: "What did Mr. Morris say to you, and what did you say to her?" Objection was made to this question, and the objection was sustained. Counsel for defendant thereupon offered to prove by this witness that the plaintiff, Mr. Morris, caused Edward Morris to sign an application for an apartment at 1430 Lake Shore Drive, which is an apartment not managed and operated by the defendants herein, and caused him to present a check for the first two month's rent on this apartment, and that this was done on or about January 21st, 1934, this being the very day upon which the plaintiff testified that Mrs. Morris told her she was going to take the apartment at 3420 Lakeview Avenue. Defendant offered this evidence as bearing on the issue as to whether or not plaintiff was the procuring cause of the lease in controversy, and that it would show that plaintiff not only did not procure the lease in controversy, but on the contrary, that she used her best efforts to make a lease to them of the apartment at 1430 Lake Shore Drive. To this offer, objection was made, and the objection was sustained by the court. In this ruling, we are of the opinion that the court was in error.

From all of the conflicting testimony of the plaintiff, we are unable to arrive at the conclusion that it was she who negotiated

the lease with the defendants. Further, both the proof received and the proffered and the improperly rejected testimony tend to prove that she had procured Morris's application for the leasing of another apartment at the time she claims she had secured him as a tenant for the apartment in question. The foundation had been laid for the making of these offers of proof, the testimony was relevant and pertinent, and the court erred in rejecting it. Harman v. Indian Grove Drainage Dist. 217 Ill. App. 503. There is no proof whatever of plaintiff's compliance with the terms of the so-called list sheet sent to the plaintiff by defendants, which are that "all applications submitted must be accompanied by the first month's rent", and the further provision that the commission would only be earned upon the acceptance of the tenant by the defendant. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

the lease with the defendants. Further, both the proof received and the proffered and the improperly rejected testimony tend to prove that she had procured Kortlain application for the leasing of another apartment at the time she claims she had secured him as a tenant for the apartment in question. The foundation had been laid for the making of these offers of proof, the testimony was relevant and pertinent, and the court erred in rejecting it. Barron v. Indian Trans Planning Div. 217 Ill. App. 602. There is no proof whatever of plaintiff's compliance with the terms of the so-called list mass sent to the plaintiff by defendants, which are that "all applications must be accompanied by the first month's rent", and the further provision that the commission would only be earned upon the acceptance of the tenant by the defendant. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HERZ, J. AND DAVIS E. MCGIVERN, J. CONCUR.

37982

RUTH F. GRAGG, Appellant, v. BARTLETT & GORDON, INC., a corporation, Appellee.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

264 I.A. 641

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County against the plaintiff for costs entered on the verdict of a jury, under the court's instruction to find the defendant not guilty.

The declaration contains three counts. In count one plaintiff charges, generally, that about September 20th, 1928, she was the owner of certain United States Liberty Bonds that were then past due, and that she requested defendant to purchase these Liberty Bonds and to sell to plaintiff industrial bonds secured by first mortgage and of equal security with the United States Liberty Bonds, that at that time, defendant was engaged in the business of selling bonds to the public, and that to induce plaintiff to sell her Liberty Bonds and to purchase other bonds from the defendant, the defendant falsely represented that a certain 8% sinking fund gold debenture bond issued by the Wayne Pump Company, dated June 1st, 1928, for the sum of $1,000 was secured by first mortgage lien upon the assets of the Wayne Pump Company, and was as good and secure a bond as the United States Liberty Bonds; that at the same time, defendant falsely represented and stated to plaintiff that a certain 6% first lien gold bond, dated December 1st, 1927, and due July 1st, 1939, issued by the Federal Public Service Corporation, for the sum of $1,000, was secured by first mortgage lien upon the assets of the Federal Public Service Corporation, and was as good and secure

37282

RUTH F. CHARO, Appellant, v. BARTLETT & CONDON, INC., a corporation, Respondent.	APPEAL FROM SUPERIOR COURT YOLO COUNTY.

8564 I.A. 641

MEMORANDUM DECISION HAIL DELIVERING THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Yolo County against the plaintiff for costs entered on the verdict of a jury, under the court's instruction to find the defendant not guilty.

The declaration contains three counts. In count one plaintiff charges, generally, that about September 20th, 1928, she was the owner of certain United States Liberty Bonds that were then past due, and that she requested defendant to purchase these Liberty Bonds and to sell to plaintiff industrial bonds secured by first mortgage and of equal security with the United States Liberty Bonds, that at that time, defendant was engaged in the business of selling bonds to the public, and that to induce plaintiff to sell her Liberty Bonds and to purchase other bonds from the defendant, the defendant falsely represented that a certain 6% sinking fund gold debenture bond issued by the Hayne Run Company, dated June 1st, 1928, for the sum of $1,000 was secured by first mortgage lien upon the assets of the Hayne Run Company, and was as good and secure a bond as the United States Liberty Bonds; that at the same time, defendant falsely represented and stated to plaintiff that a certain 6% first lien gold bond, dated December 1st, 1927, and due July 1st, 1929, issued by the Federal Public Service Corporation, for the sum of $1,000, was secured by first mortgage lien upon the assets of the Federal Public Service Corporation, and was as good and secure

as the United States Liberty Bonds, and that upon the faith of such representations made by defendant to plaintiff, and believing such statements to be true, plaintiff sold her Liberty Bonds to defendant, and with part of the proceeds purchased from defendant the two bonds mentioned. It is further alleged that the statements made as to the security for these bonds, and the value thereof, was false, and known to be false by the defendant at the time the representations were so made, and that such bonds were then, and at the time of the bringing of the suit, absolutely worthless. Count two contains the same allegations as to the character of the security and the representations of defendants as count one, except that it refers to the purchase of two certain gold debenture bonds issued by the Associated Gas & Electric Company, dated October 1st, 1928, purchased by plaintiff from the defendant for the sum of $1,500.00. Count three is the same in effect as count one, except that it refers to one certain convertible gold bond issued by the Union Power Corporation, of the face value of $1,000.00 purchased by plaintiff from defendant for the sum of $969.33. Plaintiff claims damages in the sum of $6,000.00.

Plaintiff testified, in substance, that at the times mentioned, she resided in Chicago, and that about September 26th, 1928, she visited the office of the defendant and there talked with a representative of the defendant named Reinertsen; that she told Reinertsen that she had $6,000.00 of United States Liberty Bonds which she desired to dispose of, and to reinvest the proceeds in something just as secure, but which paid a larger rate of interest and that she did not desire to invest in anything that was speculative. She further testified that "I later returned to the office of Bartlett & Gordon in the fall of 1928, and at that time I had the (Liberty) bonds with me. I had Liberty bonds in the amount of

as the United States Liberty Bonds, and that upon the faith of such representations made by defendant to plaintiff, and believing such statements to be true, plaintiff sold her Liberty Bonds to defendant, and with part of the proceeds purchased from defendant the two bonds mentioned. It is further alleged that the statements made as to the security for these bonds, and the value thereof, were false, and known to be false by the defendant at the time the representations were so made, and that such bonds were then, and at the time of the bringing of the suit, absolutely worthless.

Count two contains the same allegations as to the character of the security and the representations of defendants as count one, except that it refers to the purchase of two certain gold debenture bonds issued by the Associated Gas & Electric Company, dated October 1st, 1928, purchased by plaintiff from the defendant for the sum of $1,800.00. Count three is the same in effect as count one, except that it refers to one certain convertible gold bond issued by the Union Power Corporation, of the face value of $1,000.00 purchased by plaintiff from defendant for the sum of $[illegible]. Plaintiff claims damages in the sum of $6,000.00.

Plaintiff testified, in substance, that at the times mentioned, she resided in Ohio, and that about September 20th, 1928, she visited the office of the defendant and there talked with a representative of the defendant named Sinkerson; that she told Sinkerson that she had $[illegible] of United States Liberty Bonds which she desired to dispose of, and he returned the proceeds in something just as sound, but much [illegible] higher rate of interest and that she did not desire to invest in anything that was speculative. She further testified that "I later returned to the office of Bartlett & Gordon in the fall of 1928, and at that time I had the (Liberty) bonds with me. I had Liberty bonds in the amount of

$6,000.00 altogether, I believe. I left these bonds with Bartlett & Gordon. At that time I had a conversation with Mr. Reinertsen. He told me they would purchase these Liberty bonds from me and sell me $6,000.00 in safe bonds; that they would be absolutely safe bonds, not speculative in any way; there was $2,000 of Swiss Oil which paid a higher rate of interest than any others, and he said they would expire,(or mature) I believe, in two or three months, and because the maturity date was so close * * * I wouldn't take any chance with them and he would advise me to buy these to all the others, that they would be absolutely safe and just as secure as Liberty bonds and would pay me a little more interest. I left the Liberty bonds with Bartlett & Gordon." Defendant subsequently purchased the Liberty bonds from plaintiff for a total of $5,020.00. Plaintiff testified that "I had a conversation with Mr. Reinertsen, with reference to the character of the bonds I was buying. He told me that the Public Utility Bonds would be absolutely safe, that it is something the public would always be in need of, and that there would be no question about them, (these securities) the Wayne Pump, * * * and the Swiss Oil. He told me the bonds were good, absolutely safe, not speculative in any way. I went to their office again during the month of December, 1928, at that time I talked about this Federal Public Service bond, and I received a certain paper from the defendant," and she stated that "prior to receiving that bond, (the $1,000.00 Union Power Corporation bond maturing December 1st, 1943, which she purchased for $969.33) I had a conversation with Mr. Reinertsen with reference to that Union Power Corporation security. That conversation was in the office of Bartlett & Gordon. I do not recall anybody but Mr. Reinertsen and myself being present. The conversation I had with him was that this was a very safe, first lien bond; that the Union Power Corporation was perfectly secure; that I

$5,000.00 altogether, I believe. I left these bonds with Bartlett & Gordon. At that time I had a conversation with Mr. Reinertsen. He told me they would purchase these Liberty bonds from me and sell me $8,000.00 in safe bonds; that they would be absolutely safe bonds, not speculative in any way; there was $3,000 of Swiss Oil which paid a higher rate of interest than any others, and he said they would expire,(or mature) I believe, in two or three months, and because the maturity date was so close " " " I wouldn't take any chance with them and he would advise me to buy these to all the others, that they would be absolutely safe and just as secure as Liberty bonds and would pay me a little more interest. I left the Liberty bonds with Bartlett & Gordon." Defendant subsequently purchased the Liberty bonds from plaintiff for a total of $8,050.00. Plaintiff testified that "I had a conversation with Mr. Reinertsen, with reference to the character of the bonds I was buying. He told me that the Public Utility Bonds would be absolutely safe, that it is something the public would always be in need of, and that there would be no question about them, (these securities) the Swiss Bank, " " " and the Swiss Oil. He told me the bonds were good, absolutely safe, not speculative in any way. I went to their office again during the month of December, 1928, at that time I talked about this Federal Public Service bond, and I received a certain paper from the defendant," and she stated that "prior to receiving that bond, (the $1,000.00 Union Power Corporation bond maturing December 1st, 1943, which she purchased for $903.33) I had a conversation with Mr. Reinertsen with reference to that Union Power Corporation security. That conversation was in the office of Bartlett & Gordon. I do not recall anybody but Mr. Reinertsen and myself being present. The conversation I had with him was that this was a very safe, first lien bond; that the Union Power Corporation was perfectly secure; that I

did not take any chance in buying the bond, that was specified at the time." The plaintiff received from defendant confirmations of the purchase by the defendant of various securities, including those mentioned in the declaration.

Her testimony indicates that for the four years previous to the trial, she had been statistician for the Curtis Publishing Company in Chicago; that she kept the records of all the accounts for this corporation for the Chicago office; that her education, in addition to the primary grades, consisted of four years high school, two years at college and six months business college; that before purchasing the securities mentioned, she had received circulars from the defendant company describing various securities which defendant corporation had for sale including those which she subsequently purchased, and that she consulted with her brother, who was an electrical engineer, about her proposed purchase of securities, and as to the character of the same.

It appears that in addition to the bonds mentioned in the declaration, and which are the subject of this lawsuit, plaintiff purchased various other securities from the defendant with the proceeds of the sale of her Liberty bonds, all of which seem to have been satisfactory, at least, they are not shown to have been otherwise. She testified that "after I received the $2,000.00 Swiss Oil Corporation, I later received the money on these bonds when they matured. I received interest on the Federal Public Service Corporation gold note due August 1st, 1923, until they stopped paying. I still have the Federal Public Service Corporation bond, due December 1st, 1947. I had to deposit same because they were reorganizing. I sent it to the committee, and received a certificate of deposit for it. The paper handed me is the certificate for it."

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It appears that in addition to the bonds mentioned in the declaration, and which are the subject of this lawsuit, plaintiff purchased various other securities from the defendant with the proceeds of the sale of her Liberty bonds, all of which seem to have been satisfactory, at least, they are not shown to have been otherwise. She testified that "after I received the $3,000.00 Swift Gil Corporation, I later received the money on those bonds when they matured. I received interest on the Federal Public Service Corporation gold note due August 1st, 1929, until they stopped paying. I still have the Federal Public Service Corporation bond, due December 1st, 1957. I had to deposit some because they were reorganizing. I took it to the committee, and received a certificate of deposit for it. The paper handed me in the certificate for it."

Robert E. Gordon, one of the defendants, testified to the effect that defendants were members of a syndicate which underwrote the Union Power Corporation bonds, and that the other members of the syndicate were H. M. Byllesby & Co., Hoaglund, Allum & Tunney, Inc., and E. H. Rollins & Co. He stated that the syndicate purchased these Union Power Corporation bonds, that they were listed on the stock exchange, and that the syndicate purchased them at 92, and that the allotment of such bonds to Hartlett & Gordon amounted to $150,000. It is in evidence that plaintiff purchased these bonds in the Fall of 1928, and that before purchasing them, she examined circulars issued by defendants. Gordon testified to the effect that these circulars contained detailed information as to these bonds, and were issued after the bonds were listed on the Chicago stock exchange. He also testified that the bonds the plaintiff bought were part of the original bonds which belonged to the syndicate, under which defendant's liability to the syndicate arose, and that under the syndicate contract there was a liability on the part of his firm to take the bonds whether they were sold or not. He stated that he made an investigation with reference to the security underlying the Union Power Corporation bonds; that they consisted of the capital stock in the Federal Public Service Corporation; that the bonds were secured by a pledge of all the controlling common stock, except the directors' qualifying shares of the Federal Public Service Corporation, and that there was a substantial paid in capital; that the collateral pledged for these bonds was the earnings of 26 or 27 other properties, with an income of $200,000 a year; that the Union Power Corporation was not only a holding company, but acted as an engineering and managing corporation, and owned all of the equipment of the Federal Service Corporation; that it had copies of all the

Robert E. Gordon, one of the defendants, testified to the effect that defendants were members of a syndicate which underwrote the Union Power Corporation bonds, and that the other members of the syndicate were E. M. Byllesby & Co., Hemphill, Noyes & Tunney, Inc., and E. H. Rollins & Co. He stated that the syndicate purchased these Union Power Corporation bonds, that they were listed on the stock exchange, and that the syndicate purchased them at 92, and that the allotment of such bonds to Hartlett & Gordon amounted to $180,000. It is in evidence that plaintiff purchased these bonds in the fall of 1928, and that before purchasing them, she examined circulars issued by defendants. Gordon testified to the effect that these circulars contained detailed information as to these bonds, and were issued after the bonds were listed on the Chicago stock exchange. He also testified that the bonds the plaintiff bought were part of the original bonds which belonged to the syndicate, under which defendant's liability to the syndicate ceased, and that under the syndicate contract there was a liability on the part of his firm to take the bonds whether they were sold or not. He stated that he made an investigation with reference to the security underlying the Union Power Corporation bonds; that they consisted of the capital stock in the Federal Public Service Corporation; that the bonds were secured by a pledge of all the controlling common stock, except the directors' qualifying shares of the Federal Public Service Corporation, and that there was a substantial paid in capital; that the collateral pledged for these bonds was the earnings of 25 or 27 other properties, with an income of $200,000 a year; that the Union Power Corporation was not only a holding company, but acted as an engineering and managing corporation, and owned all of the equipment of the Federal Service Corporation; that it had copies of all the

audits, earnings and contracts of the companies which were represented by the common stock of the Federal Public Service Corporation, and that the Union Power Corporation is still intact, but is in receivership. There is no showing that any of these statements were untrue.

In Zalapi v. Holcomb & Hehe Mfg. Co., 241 Ill. App. 102, the plaintiff filed a bill in the Circuit Court of Winnebago County, by which he sought to set aside a written contract made with the defendant for the purchase of a popcorn machine, the bill being based on the charge that the contract between the plaintiff and defendant corporation was obtained by false and fraudulent representations. It was also sought by the bill to cancel a note and chattel mortgage given as evidence of and to secure the payment of a price agreed to be paid. In its statement of the case, the court recited that the agent of the defendant had called at the place of business of the plaintiff for the purpose of selling him the popcorn machine in question; that this agent told plaintiff that plaintiff's place of business in the city of Rockford was a good location in which to put this machine; that the agent would guarantee it would improve the business at least fifty percent; that the agent was sure the business would pay for the machine out of the proceeds; that if it did not, the defendant would take the machine back and return the money. The appeal in the case to the Appellate Court was from a decree of the Circuit Court, dismissing the bill for want of equity, and in affirming the decree, the court said:

> "It is a well known rule of law that false representations which are sufficient to justify the recission of a contract must be as to material facts. Mere matters of opinion, between parties dealing upon equal terms, though falsely made, are not sufficient. Exaggerations and commendations of articles offered for sale will not avoid a contract. It has been held that such conduct may be reprehensible, but

audits, earnings and contracts of the companies which were represented by the common stock of the Federal Public Service Corporation, and that the Union Power Corporation is still intact, but is in receivership. There is no showing that any of these statements were untrue.

In Reinert v. Kalamazoo & Bear Riv. Co., 141 Ill. App. 103, the plaintiff filed a bill in the Circuit Court of Kalamazoo County, by which he sought to set aside a written contract made with the defendant for the purchase of a popcorn machine, the bill being based on the charge that the contract between the plaintiff and defendant corporation was obtained by false and fraudulent representations. It was also sought by the bill to cancel a note and chattel mortgage given as evidence of and to secure the payment of a price agreed to be paid. In its statement of the case, the court recited that the agent of the defendant had called at the place of business of the plaintiff for the purpose of selling him the popcorn machine in question; that this agent told plaintiff th t plaintiff's place of business in the city of Cookford was a good location in which to set this machine; that the agent would guarantee it would improve the business at least fifty percent; that the agent was sure the business would pay for the machine out of the proceeds; that if it did not, the defendant would take the machine back and return the money. The appeal in the case to the Appellate Court was from a decree of the Circuit Court, dismissing the bill for want of equity, and in affirming the decree, the court said:

> "It is a well known rule of law that false representations which are sufficient to justify the rescission of a contract must be as to material facts. Mere matters of opinion, between parties dealing upon equal terms, though falsely made, are not sufficient. Representations and recommendations of articles offered for sale will not avoid a contract. It has been held that such contract may be repudiated, but

> the law does not hold parties responsible for the truth or falsity of expressions of opinion, or as to values where no special confidence as to the merits of an article offered for sale is reposed, and mere puffings and exaggerations are not sufficient to avoid a contract. Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co., 242 Ill. 88."

A careful examination of the record here indicates that the only direct statement as to the character of the securities acquired by plaintiff from the defendant, was as to the Swiss Oil Corporation notes, or debentures. As stated, she testified that these were all taken up and paid. The representations as to the soundness of these securities were apparently honest expressions of opinion as to their soundness. Defendant Gordon's undisputed testimony indicates that his firm were given the same information when they purchased these securities, as they gave to plaintiff.

Counsel for plaintiff cites the case of Buttitta v. Lawrence, et al. 346 Ill. 64, as authority to support plaintiff's claimed right of recovery. In that case, however, there was a positive statement made by the defendant to the plaintiff, who could not read or write the English language, that the maker of certain notes purchased of plaintiff was solvent, and that the notes were good and collectible, when, as a matter of fact, the notes were long past due and recovery on them was barred by the Statute of Limitations. No such comparable case is presented here.

Testimony was offered by plaintiff and received by the court as to the financial status of these corporations at the time of, or shortly before, the trial, as tending to prove her claim that she had been swindled.

In People v. Johnson, 366 Ill. 380, an information was filed by the State's Attorney of Cook County in the Municipal Court of Chicago, in which the defendant was charged with the violation of the Illinois Securities Act, in that he made false representations about certain bonds of the Fairfax Securities Company. In the

the law does not hold parties responsible for the truth or falsity of expressions of opinion, or as to values where no special confidence as to the merits of an article offered for sale is proposed, and mere puffings and exaggerations are not sufficient to avoid a contract. Thorne & Dean Mfg. Co. v. E. J. Kittredge & Co., 242 Ill. 88."

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Counsel for plaintiff cites the case of Whitten v. Lawrence, et al. 248 Ill. 84, as authority to support plaintiff's claimed right of recovery. In that case, however, there was a positive statement made by the defendant to the plaintiff, who could not read or write the English language, that the maker of certain notes purchased of plaintiff was solvent, and that the notes were good and collectible, when, as a matter of fact, the notes were long past due and recovery on them was barred by the statute of limitations. No such comparable case is presented here.

Testimony was offered by plaintiff and received by the court as to the financial status of these corporations at the time of, or shortly before, the trial, as tending to prove her claim that she had been swindled.

In People v. Johnson, 266 Ill. 382, an information was filed by the State's Attorney of Cook County in the Municipal Court of Chicago, in which the defendant was charged with the violation of the Illinois Securities Act, in that he made false representations about certain bonds of the Fairfax Securities Company. In the

presentation of the case, the state showed that at the time of the trial, the corporation was insolvent. In reversing a judgment of conviction, the court said:

> "Much is said in the argument on behalf of the People of the proof that the Fairfax Company at the time of the trial had no office, its charter had been forfeited and its furniture and equipment sold for delinquent rent. These events all occurred subsequent to the sale or exchange under consideration. The court has the right to take into consideration current history. The court is not unmindful of the financial cataclysm which rocked the nation in the fall of 1929. A large number of corporations of far greater magnitude and occupying high financial positions have fallen to destruction since the fall of 1929. The fact that the Fairfax Company met with financial difficulties in 1930 does not prove its financial condition or the value of condition of its securities in either July or September, 1929."

We find nothing in the record to indicate that there was any statement of fact made to the plaintiff by defendants as to the securities described in the declaration which they knew to be false and upon which she can predicate this action. The mere fact that these companies failed after plaintiff purchased their bonds, has no bearing upon the case. She was a woman of intelligence and education, and had had considerable business experience, and she seems to have consulted with competent and knowing persons, not connected with the defendant, before she made these purchases. We are of the opinion that the court was not in error in directing the jury to find for the defendant, and the judgment, is therefore, affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

presentation of the case, the state showed that at the time of the trial, the corporation was insolvent. In reversing a judgment of conviction, the court said:

> "Much is said in the argument on behalf of the people of the proof that the Fairfax Company at the time of the trial had no office, its charter had been forfeited and its furniture and equipment sold for delinquent rent. These events all occurred subsequent to the sale or exchange under consideration. The court has the right to take into consideration current history. The court is not unmindful of the financial catastrophe which rocked the nation in the fall of 1929. A large number of corporations of far greater magnitude and occupying high financial positions have fallen to destruction since the fall of 1929. The fact that the Fairfax Company met with financial difficulties in 1930 does not mean its financial condition or the value of condition of its securities in either July or September, 1929."

We find nothing in the record to indicate that there was any statement of fact made to the plaintiff by defendants as to the securities described in the declaration which they knew to be false and upon which she can predicate this action. The mere fact that these companies failed after plaintiff purchased their bonds, has no bearing upon the case. She was a woman of intelligence and education, and had had considerable business experience, and she seems to have consulted with competent and knowing persons, not connected with the defendant, before she made these purchases. We are of the opinion that the court was not in error in directing the jury to find for the defendant, and the judgment, is therefore, affirmed.

AFFIRMED.

MCGEE, J., AND GEORGE E. MCCLAVE, J. CONCUR.

38006

MADGE COE EBERT, Appellee, v. MAHALO PLANK, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 642

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago for the sum of $240.00 and costs, together with $50.00 attorney's fees, entered in an action by the plaintiff against defendant to recover for wages alleged to be due plaintiff from defendant. It is shown that a wage demand was made by plaintiff upon defendant, as provided by statute.

The statement of claim charges that plaintiff was employed by defendant at a wage of $25.00 per month for a period from October, 1933, to August 10th, 1934.

Defendant's position is that she was employed by the Peoples Mortgage Company, a corporation, that she employed plaintiff on behalf of her employer, to manage a building, and that when she did so, she acted solely as the agent of her employer.

The plaintiff testified in substance that she was employed by defendant to manage a building for defendant at an agreed wage of $25.00 per month, together with the privilege of occupying an apartment in the building, which was located at 4212 Ellis Avenue, in the city of Chicago; that she continued to manage the building from 1932 down to October, 1933, and that up to that time she received the $25.00 per month, together with her rent; that in October, 1933, defendant told plaintiff that she, defendant, did not have sufficient money to pay plaintiff, but that if plaintiff would go along with defendant through the World's Fair in 1934, defendant would have the money with which to pay her; that

38002

MADGE DOE EMERT,	APPEAL FROM
Appellee,	
v.	MUNICIPAL COURT
MARGIO PLATE,	OF CHICAGO.
Appellant.	284 I.A. 642

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago for the sum of $240.00 and costs, together with $50.00 attorney's fees, entered in an action by the plaintiff against defendant to recover for wages alleged to be due plaintiff from defendant. It is shown that a wage demand was made by plaintiff upon defendant, as provided by statute.

The statement of claim charges that plaintiff was employed by defendant at a wage of $22.00 per month for a period from October, 1932, to August 10th, 1934.

Defendant's position is that she was employed by the Peoples Mortgage Company, a corporation, that she employed plaintiff on behalf of her employer, to manage a building, and that when she did so, she acted solely as the agent of her employer.

The plaintiff testified in substance that she was employed by defendant to manage a building, for defendant at an agreed wage of $22.00 per month, together with the privilege of occupying an apartment in the building, which was located at 6212 Ellis Avenue, in the city of Chicago; that she continued to manage the building from 1932 down to October, 1933, and that up to that time she received the $22.00 per month, together with her rent; that in October, 1933, defendant told plaintiff that she, defendant, did not have sufficient money to pay plaintiff, but that if plaintiff would go along with defendant through the World's Fair in 1934, defendant would have the money with which to pay her; that

plaintiff remained and performed her duties until the last of August, 1934, and that from October, 1933, to August, 1934, she received no money, but only her room in the building; that on the last of August, 1934, defendant called plaintiff and thereupon figured up the amount of salary due plaintiff which was unpaid, and that defendant stated to plaintiff that it amounted to $240.00, and that defendant asked plaintiff this question: "Now, is that right, is that what I owe you?" to which plaintiff answered, "Yes, that is right." On cross-examination, plaintiff testified to the effect that when she went to see defendant, she saw the name "Peoples Mortgage Company" on the door of defendant's office; that among the duties performed by her was that she received various articles delivered to the apartment building at 4212 Ellis Avenue, where plaintiff resided, for which plaintiff gave written receipts, and that these articles were billed to the Peoples Mortgage Company, and were for purchases made by this institution.

Florence B. Coe, the mother of the plaintiff, testified in substance that she was present at a conversation between the plaintiff and defendant regarding the wages due plaintiff, and that defendant said to plaintiff that plaintiff should figure up the amount of wages owed by defendant to plaintiff, and that after this was done, defendant said to plaintiff that she, defendant, owed plaintiff $240.00.

Defendant testified in substance that she occupied an office at Room 1808, 77 West Washington Street, and that the name "Peoples Mortgage Company" was on the door of this office; that she first met plaintiff in this office and had a conversation with her, and that a Mr. Cutler was present at that conversation; that plaintiff came to defendant through an employment agency. Defendant further testified that she told plaintiff that she would employ her at the rate of $25.00 per month, in addition to furnishing

plaintiff remained and performed her duties until the last of August, 1934, and that from October, 1933, to August, 1934, she received no money, but only her room in the building; that on the last of August, 1934, defendant called plaintiff and thereupon figured up the amount of salary due plaintiff which was unpaid, and that defendant stated to plaintiff that it amounted to $240.00, and that defendant asked plaintiff this question: "Now, is that right, is that what I owe you?" to which plaintiff answered, "Yes, that is right." On cross-examination, plaintiff testified to the effect that when she went to see defendant, she saw the name "Peoples Mortgage Company" on the door of defendant's office; that among the duties performed by her was that she received various articles delivered to the apartment building at 4212 Hills Avenue, where plaintiff resided, for which plaintiff gave written receipts, and that these articles were billed to the Peoples Mortgage Company, and were for purchases made by this institution.

Florence E. Doe, the mother of the plaintiff, testified in substance that she was present at a conversation between the plaintiff and defendant regarding the wages due plaintiff, and that defendant said to plaintiff that plaintiff should figure up the amount of wages owed by defendant to plaintiff, and that after this was done, defendant said to plaintiff that she, defendant, owed plaintiff $240.00.

Defendant testified in substance that she occupied an office at Room 1806, 77 West Washington Street, and that the name "Peoples Mortgage Company" was on the door of this office; that she first met plaintiff in this office and had a conversation with her, and that a Mr. Miller was present at that conversation; that plaintiff came to defendant through an employment agency. Defendant further testified that she told plaintiff that she would employ her at the rate of $30.00 per month, in addition to furnishing

plaintiff with a two room apartment in the building which plaintiff should manage; that she, defendant, at that time was employed by the Peoples Mortgage Company as bookkeeper and secretary; that plaintiff went to work that night, and that defendant went out and showed her around. Defendant denied that she had any conversation with plaintiff in August in the presence of plaintiff's mother, and denied that she, defendant ever figured up how much she owed plaintiff, or that she promised to pay her any sum. She further testified that on October 24th, 1933, she told defendant that there was no more money coming in from the building, with which to pay plaintiff, but that if plaintiff wanted to stay on in her two room apartment, it would be all right, and if this arrangement was not satisfactory, plaintiff could look for something else to do. She further testified that plaintiff stated that she was willing to stay on in her apartment, and that the following day plaintiff brought her mother to the apartment and took in a roomer and a boarder at $10.00 a week.

Clyde Cutler testified to the effect that he was present in the office of the Peoples Mortgage Company when plaintiff and defendant had a conversation, and that defendant explained to plaintiff that the building which plaintiff would manage had been taken over by the Peoples Mortgage Company and was being operated from the office of this company. This witness also testified that he heard a conversation between the parties, and that defendant told plaintiff that there was no money left with which to pay salaries and that it was necessary to close the building down; that plaintiff told defendant that she, plaintiff, could operate the building if she would accept as her compensation the use of an apartment in the building, and that plaintiff's mother came to live with her in this apartment, and that she plaintiff, also spoke about having taken in a boarder to help her out and take the place of the salary.

plaintiff with a two room apartment in the building which plaintiff should manage; that she, defendant, at that time was employed by the People Mortgage Company as bookkeeper and secretary; that plaintiff went to work that night, and that defendant went out and showed her around. Defendant denied that she had any conversation with plaintiff in regard in the presence of plaintiff's mother, and denied that she, defendant ever figured up how much she owed plaintiff, or that she promised to pay her any sum. The further testified that on October 26th, 1922, she told defendant that there was no more money coming in from the building, with which to pay plaintiff, but that if plaintiff wanted to stay on in her two room apartment, it would be all right, and if this arrangement was not satisfactory, plaintiff could look for something else to do. She further testified that plaintiff stated that she was willing to stay on in her apartment, and that the following day plaintiff brought her mother to the apartment and took in a roomer and a boarder at $10.00 a week.

Gayle Walker testified to the effect that he was present in the office of the People Mortgage Company when plaintiff and defendant had a conversation, and that defendant explained to plaintiff that the building which plaintiff would manage had been taken over by the People Mortgage Company and was being operated from the office of this company. This witness also testified that he heard a conversation between the parties, and that defendant told plaintiff that there was no money left with which to pay salaries and that it was necessary to close the building down; that plaintiff told defendant that she, plaintiff, could operate the building if she would accept as her compensation the use of an apartment in the building, and that plaintiff's mother came to live with her in this apartment, and that she plaintiff, also took some roomer taken in a boarder to help her out and take the place of the salary.

After all this testimony was given in the trial court, plaintiff was recalled and stated that at the time defendant said there was no more money to pay her, that she, plaintiff, told defendant that she would go along, and that defendant then promised that she would pay her out of the World's Fair business when it came in, evidently meaning rentals coming from the apartment building known as 4212 Ellis Avenue.

The court found for the plaintiff and entered the judgment as hereinbefore recited. The evidence clearly indicates that defendant was acting as agent for the Peoples Mortgage Company when she employed plaintiff, and we are of the opinion that the finding of the court was contrary to the manifest weight of the evidence. The judgment is, therefore, reversed.

REVERSED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

After all this testimony was given in the trial court, plaintiff was recalled and stated that at the time defendant said there was no more money to pay her, that she, plaintiff, told defendant that she would go along, and that defendant then promised that she would pay her out of the world's fair business when it came in, evidently meaning receipts coming from the apartment building known as 6232 Ellis Avenue.

The court found for the plaintiff and entered the judgment in heretofore recited. The evidence clearly indicates that defendant was acting as agent for the Peoples Mortgage Company when she employed plaintiff, and we are of the opinion that the finding of the court was contrary to the manifest weight of the evidence. The judgment is, therefore, reversed.

REVERSED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

38016

LIEBERMAN BED SPRING COMPANY, a corporation, (Plaintiff) Appellee, v. A. BRANDWEIN & CO., a corporation, (Defendant) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

264 I.A. 642

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago, in favor of plaintiff, entered in a replevin suit brought by plaintiff against the defendant, to recover the possession of a certain tufting machine.

The affidavit for replevin filed in the cause recites that on the 20th day of March, 1934, defendant, a corporation, wrongfully took, and have wrongfully detained, the property mentioned in the affidavit, from the plaintiff. The other usual and formal statements contained in an affidavit for replevin are contained in this affidavit. The action is based upon a chattel mortgage given on October 20th, 1933, by the Levine Bedding Company of Bay City, Michigan, to secure an indebtedness of $2,000, due to the plaintiff, which was shown by plaintiff, and not denied by defendant, to be the fact.

It is shown that the defendant acquired this machine from the Levine Bedding Company, mortgagor, subsequent to the execution of the chattel mortgage, and the note which it is given to secure. Defendants principal defense is that there is no proof that the machine in question is the identical machine named in the chattel mortgage. It is also contended that at the time defendant acquired this machine, there was a prior chattel mortgage lien on the machine to secure the indebtedness of $131.56, plus

38016

LIBERMAN BED SPRING COMPANY, a corporation, (Plaintiff) Appellee, v. A. BRANDWEIN & CO., a corporation, (Defendant) Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

254 I.A. 642

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago, in favor of plaintiff, entered in a replevin suit brought by plaintiff against the defendant, to recover the possession of a certain lifting machine.

The affidavit for replevin filed in the cause recites that on the 30th day of March, 1934, defendant, a corporation, wrongfully took, and have wrongfully detained, the property mentioned in the affidavit, from the plaintiff. The other usual and formal statements contained in an affidavit for replevin are contained in this affidavit. The action is based upon a chattel mortgage given on October 30th, 1932, by the Levine Bedding Company of Bay City, Michigan, to secure an indebtedness of $2,000, due to the plaintiff, which was shown by plaintiff, and not denied by defendant, to be the fact.

It is shown that the defendant acquired this machine from the Levine Bedding Company, mortgagor, subsequent to the execution of the chattel mortgage, and the note which it is given to secure. Defendants principal defense is that there is no proof that the machine in question is the identical machine named in the chattel mortgage. It is also contended that at the time defendant acquired this machine, there was a prior chattel mortgage lien on the machine to secure the indebtedness of $121.50, plus

interest, to the United States Mattress Machine Company of Quincy, Massachusetts. The proof as to the identity of the machine is that of a witness for plaintiff, who saw a tufting machine in the place of business of mortgagor, prior to the execution of the chattel mortgage, and who swore positively that the mortgagor at no time had in its place of business at Bay City, Michigan, more than the one tufting machine. The defendant offered no evidence to refute this or to show that the machine in question is not the machine described in the mortgage.

Whether or not plaintiff takes this machine subject to a prior lien is for plaintiff to worry about and is of no concern to the defendant. Defendant derived its title from the mortgagor, and if this is the identical machine mortgaged, and the only evidence in the record is to the effect that it is, then plaintiff is shown to have the right to recover its possession. The judgment is affirmed.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

interest, to the United States Mattress Machine Company of Quincy, Massachusetts. The proof as to the identity of the machine is that of a witness for plaintiff, who saw a tufting machine in the place of business of mortgagor, prior to the execution of the chattel mortgage, and who swore positively that the mortgagor at no time had in its place of business at Bay City, Michigan, more than one tufting machine. The defendant offered no evidence to refute this or to show that the machine in question is not the machine described in the mortgage.

Whether or not plaintiff takes this machine subject to a prior lien in for plaintiff to worry about and is of no concern to the defendant. Defendant derived its title from the mortgagor, and if this is the identical machine mortgaged, and the only evidence in the record is to the effect that it is, then plaintiff is shown to have the right to recover its possession. The judgment is affirmed.

AFFIRMED.

HERRY, J. AND BERRIS E. SULLIVAN, J. CONCUR.

38027

GODCHAUX SUGARS, INC., a corporation,
(Plaintiff) Appellee,

v.

MEINRATH BROKERAGE COMPANY, a corporation,
(Defendant) Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

284 I.A. 642

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago against it for the sum of $10,214.87. To plaintiff's amended statement of claim, defendant filed a verified affidavit of merits, which, upon motion of plaintiff, was stricken. The court thereupon entered an order to the effect that the defendant was in default for want of an affidavit of merits, or defense, and upon the affidavit of claim without any further evidence than that contained in the affidavit, the court entered judgment for the amount of the claim. The motion to strike the affidavit of merits filed by defendants, being in the nature of a demurrer, therefore, the plaintiff admitted as true all of the material facts set up in this affidavit of merits. State Street Furniture Co. v. Armour & Co., 259 Ill. App. 589.

Plaintiff's action is predicated upon the alleged fact that on June 24th, 1931, plaintiff and defendant entered into an agreement in writing, by the terms of which plaintiff undertook to procure certain promissory notes of and from one E. H. Hacker, such notes to be payable to the order of plaintiff, and which notes defendant agreed to purchase from the plaintiff at the face thereof, without interest. The notes to be procured were as follows: Six notes to be in the amount of $2,730.00 each, and two notes to be in the sum of $2,640.00 each. It is further alleged in this statement of claim that subsequent to this original agreement made on June 24th,

ZEMBY

GODCHAUX SUGARS, INC., a corporation,

(Plaintiff) Appellee,

v.

REINHART WOCKENHOEFER COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE MAIL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal Court of Chicago against it for the sum of $10,114.87. To plaintiff's amended statement of claim, defendant filed a verified affidavit of merits, which, upon motion of plaintiff, was stricken. The court thereupon entered an order to the effect that the defendant was in default for want of an affidavit of merits, or defense, and upon the affidavit of claim without any further evidence than that contained in the affidavit, the court entered judgment for the amount of the claim. The motion to strike the affidavit of merits filed by defendants, being in the nature of a demurrer, therefore, the plaintiff admitted as true all of the material facts set up in this affidavit of merits. Attic Street Furniture Co. v. Jackson & Co., 330 Ill. App. 329.

Plaintiff's action is predicated upon the alleged fact that on June 24th, 1924, plaintiff and defendant entered into an agreement in writing, by the terms of which plaintiff undertook to procure certain promissory notes of and from one W. H. Hooker, such notes to be payable to the order of plaintiff, and which notes defendant agreed to purchase from the plaintiff at the face thereof, without interest. The notes to be procured were as follows: Six notes to be in the amount of $2,710.00 each, and two notes to be in the sum of $3,340.00 each. It is further alleged in this statement of claim that subsequent to this original agreement made on June 24th,

1931, another and further agreement was entered into between the parties on September 10th, 1931, by the terms of which plaintiff was to acquire from Hacker eleven notes, ten to be in the sum of $2,000.00 each, and one for $1,660.00, which defendant agreed to purchase. The latter agreement is alleged to be evidenced by a writing from defendant to plaintiff. The aggregate of these notes was $21,660.00, and plaintiff alleges that four of the notes aggregating $8,000.00, were delivered to defendant and paid for by it, that plaintiff was at all times, and had been ready, willing and able to deliver the other seven notes aggregating $13,660.00, but that defendant has refused to pay plaintiff any sums other than those mentioned.

In its affidavit of merits which was stricken, as above indicated, defendant admits that plaintiff agreed to acquire and sell to defendant, and that defendant undertook to purchase from plaintiff, the promissory notes first above referred to, and to pay plaintiff the sum of $21,660.00 therefor, and that the agreement was reduced to writing, and admits that on September 1st, 1931, Hacker made certain promissory notes, but defendant denies that they were the notes contemplated by the contract between the parties.

It is further charged in its affidavit of merits that the second agreement between the parties was without consideration; that defendant has never made any tender of the seven notes which defendant is alleged to have agreed to take and pay for; that it has paid $11,970.00 on account of notes, instead of $8,000.00, as alleged in the plaintiff's statement of claim, and that on July 28th, 1932, defendant requested plaintiff to deliver the additional notes to defendant, which the plaintiff refused to do. The allegations contained in the defendant's affidavit of merits raised a question of fact, and the court was in error in striking it.

1921, another and further agreement was entered into between the parties on September 10th, 1921, by the terms of which plaintiff was to acquire from defendant eleven notes, ten to be in the sum of $2,000.00 each, and one for $1,880.00, which defendant agreed to purchase. The latter agreement is alleged to be evidenced by a writing from defendant to plaintiff. The aggregate of these notes was $21,880.00, and plaintiff alleges that four of the notes aggregating $8,000.00, were delivered to defendant and paid for by it, that plaintiff was at all times, and had been ready, willing and able to deliver the other seven notes aggregating $13,880.00, but that defendant has refused to pay plaintiff any sum other than those mentioned.

In the affidavit of merits which was stricken, as above indicated, defendant admits that plaintiff agreed to acquire and sell to defendant, and that defendant understood to purchase from plaintiff, the promissory notes first above referred to, and to pay plaintiff the sum of $21,880.00 therefor, and that the agreement was reduced to writing, and admits that on September 1st, 1921, Hooker made certain promissory notes, but defendant denies that they were the notes contemplated by the contract between the parties.

It is further observed in its affidavit of merits that the second agreement between the parties was without consideration; that defendant has never made any tender of the seven notes which defendant is alleged to have agreed to take and pay for; that it has paid $13,970.00 on account of notes, instead of $8,000.00, as alleged in the plaintiff's statement of claim, and that on July 20th, 1922, defendant requested plaintiff to deliver the additional notes to defendant, which the plaintiff refused to do. The allegations contained in the defendant's affidavit of merits raised a question of fact, and the court was in error in striking it.

The judgment is, therefore, reversed and remanded with the direction that the court enter an order vacating its order striking the affidavit of merits, and that the court cause a trial to be had upon the issues made by the statement of claim and affidavit of merits.

REVERSED AND REMANDED WITH DIRECTION.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

The judgment is, therefore, reversed and remanded with the direction that the court enter an order vacating its order striking the affidavit of merits, and that the court cause a trial to be had upon the issues made by the statement of claim and affidavit of merits.

REVERSED AND REMANDED WITH DIRECTION.

HENRY, J. AND DENIS E. SULLIVAN, J. CONCUR.

38036

In re Estate of CHARLES H. HINKSTON, Deceased,

HARTFORD ACCIDENT AND INDEMNITY CO.,
(Petitioner) Appellee,

v.

FRANCIS A. HARPER,
(Respondent) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

284 I.A. 642

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, entered on November 7th, 1934, in and by which Francis A. Harper is ordered to pay to the Hartford Accident and Indemnity Company the sum of $900.00, which Harper is found to be withholding from the assets of the estate of Charles H. Hinkston, deceased.

About August 20th, 1932, the Hartford Accident and Indemnity Company filed a petition in the Probate Court of Cook County in and by which it is represented among other things, that the company had signed a bond as surety for L. Albert Stewart, administrator of the estate of Charles H. Hinkston, deceased, and that Harper had in his possession and retained the sum of $900.00 of money belonging to this estate. In this petition the Hartford Accident and Indemnity Company prayed that a rule be entered on Harper to show cause why he should not be punished for contempt of the Probate Court for his wilful failure to account to the petitioner, the Hartford Accident and Indemnity Company, for the sum of $900.00, which he, Harper, is alleged to have unlawfully withheld, and which properly belonged to the assets of the estate of the decedent. Thereafter, and after a hearing on December 15th, 1932, in the Probate Court of Cook County, an order was entered denying the prayer of the petitioner. From this order an appeal was taken to

38039

In re Estate of CHARLES H. HINKSTON, Deceased,	
HARTFORD ACCIDENT AND INDEMNITY CO., (Petitioner) Appellee, v. FRANCIS A. HARPER, (Respondent) Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

2 34 I.A. 642

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, entered on November 7th, 1934, in and by which Francis A. Harper is ordered to pay to the Hartford Accident and Indemnity Company the sum of $300.00, which Harper is found to be withholding from the assets of the estate of Charles H. Hinkston, deceased.

About August 20th, 1927, the Hartford Accident and Indemnity Company filed a petition in the Probate Court of Cook County in and by which it is represented among other things, that the company had signed a bond as surety for L. Albert Stewart, administrator of the estate of Charles H. Hinkston, deceased, and that Harper had in his possession and retained the sum of $300.00 of money belonging to this estate. In this petition the Hartford Accident and Indemnity Company prayed that a rule be entered on Harper to show cause why he should not be punished for contempt of the Probate Court for his willful failure to account to the petitioner, the Hartford Accident and Indemnity Company, for the sum of $300.00, which he, Harper, is alleged to have unlawfully withheld, and which properly belonged to the assets of the estate of the decedent. Thereafter, and after a hearing on December 16th, 1927, in the Probate Court of Cook County, an order was entered denying the prayer of the petitioner. From this order an appeal was taken to

the Circuit Court, and after a hearing in that court, the order appealed from was entered.

Paragraph 82 of Chapter 3, Illinois State Bar Stats. 1935, being section 81 of "An Act of the General Assembly of the State of Illinois in regard to the administration of estates, as amended by an act approved and in force March 19th, 1873," provides:

> "If any executor or administrator, or other person interested in any estate, shall state upon oath, to any county or probate court, that he believes that any person has in his possession or control, or has concealed, converted, or embezzled, any goods, chattels, moneys or effects, books of accounts, papers or any evidences of debt whatever, or titles to lands belonging to any deceased person, or the executor or administrator, or the estate of any deceased person, or that he believes that any person has any knowledge or information of or concerning any indebtedness or evidences of indebtedness, or property, titles or effects, belonging to any deceased person, or to the executor or administrator or the estate of any deceased person, which knowledge or information is necessary to the recovery of the same, by suit or otherwise, by the executor or administrator, of which the executor or administrator is ignorant, and that such person refuses to give to the executor or administrator such knowledge or information, the court shall require such person to appear before it by citation and may examine him on oath, and hear the testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the case may require. The court shall have power to hear, settle and adjudge all controverted questions of title and claims of adverse title and to determine the right of property.
>
> Such questions of title and of rights of property, and such claims of adverse title shall be determined upon the demand of either party, by a trial by jury."

Harper was found by the court to be guilty of withholding assets from the estate of decedent, and if this finding was justified, then the court should have ordered him to pay the money to the personal representative of the estate, but we find nothing in the statute, nor in the facts alleged in the petition, to justify the court in ordering this money to be paid to the petitioner. Therefore, the order of the Circuit Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

the circuit court, and after a hearing in that court, the order appealed from was entered.

Paragraph 82 of Chapter 3, Illinois State Bar Stats. 1922, being section 82 of "an act of the General Assembly of the State of Illinois in regard to the administration of estates, as amended by an act approved and in force June 14th, 1873," provides:

> "If any executor or administrator, or other person interested in any estate, shall state upon oath, to any county or probate court, that he believes that any person has in his possession or control, or has concealed, converted, or embezzled, any goods, chattels, money or effects, books of accounts, papers or any evidences of debt whatever, or title to lands belonging to any deceased person, or the executor or administrator, or the estate of any deceased person, or that he believes that any person has any knowledge or information of or concerning any indebtedness or evidences of indebtedness, or property, title or effects, belonging to any deceased person, or to the executor or administrator or the estate of any deceased person, which knowledge or information is necessary to the recovery of the same, by suit or otherwise, by the executor or administrator, of which the executor or administrator is ignorant, and that such person refuses to give to the executor or administrator such knowledge or information, the court shall require such person to appear before it by citation and may examine him on oath, and hear the testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the case may require. The court shall have power to hear, settle and adjudge all controverted questions of title and claims to adverse title and to determine the right of property.
>
> Such questions of title and of rights of property, and such claims of adverse title shall be determined upon the demand of either party, by a trial by jury."

Error was found by the court to be guilty of withholding assets from the estate of decedent, and if this finding was justified, then the court should have ordered him to pay the money to the personal representative of the estate, but we find nothing in the statute, nor in the facts alleged in the petition, to justify the court in ordering this money to be paid to the petitioner. Therefore, the order of the circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

KERN, J. (DO DISSENT, JUSTICES J. DUNN.

38078

EQUITABLE LIFE INSURANCE COMPANY OF IOWA, J. J. MURPHY, HOMER G. BOESENBERG and DWIGHT E. KINSEY,

Appellees,

v.

VILLAGE OF BELLWOOD, WILLIAM J. MINK, President of the Board of Trustees and of the Board of Local Improvements, FRANK J. MARIK, CHARLES W. McCOMB, CHARLES F. RICHTER, CLARENCE E. BEETZ, PAUL G. SCHEIBLEIN and WILLIAM A. WALL, Members of the Board of Local Improvements and of the Board of Trustees of said Village,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

284 I.A. 643

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County, by which order the court directs that a writ of mandamus issue against the Village of Bellwood, William J. Mink, President of the Board of Local Improvements of such Village, and Frank J. Marik, Charles W. McComb, Charles F. Richter, Clarence E. Beetz, Paul G. Scheiblein and William A. Wall, Members of the Board of Local Improvements of such Village, commanding them to cause an estimate to be made of the amount of the deficiency in certain special assessments levied for the purpose of making certain local improvements in the Village of Bellwood, in accordance with the findings of the County Court of Cook County, and to recommend that the Board of Trustees pass an ordinance providing for the levying of a second, or supplemental, assessment to pay for said deficiency, and further compelling said persons to pass said ordinance providing for a second or supplemental assessment, and to cause an assessment roll to be spread, and a petition to be filed in the County Court of Cook County, and a judgment of confirmation obtained thereon, confirming the levying of a second or supplemental assessment, in order to make up the deficiency existing in said assessments.

38079

EQUITABLE LIFE INSURANCE COMPANY OF IOWA, J. J. MURPHY, ROBERT E. HORSENBERG and DWIGHT E. MINER, Appellees, v. VILLAGE OF BELLWOOD, WILLIAM J. MINK, President of the Board of Trustees and of the Board of Local Improvements, FRANK J. MARIK, CHARLES W. MCCOMB, CHARLES F. RIGHTER, CLARENCE E. BEETS, PAUL C. SCHEIBLEIN and WILLIAM A. WALL, members of the Board of Local Improvements of the Board of Trustees of said Village, Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. PRESIDING JUSTICE MACK DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County, by which order the court directs that a writ of mandamus issue against the Village of Bellwood, William J. Mink, President of the Board of Local Improvements of such Village, and Frank J. Marik, Charles W. McComb, Charles F. Righter, Clarence E. Beets, Paul C. Scheiblein and William A. Wall, members of the Board of Local Improvements of such Village, commanding them to cause an estimate to be made of the amount of the deficiency in certain special assessments levied for the purpose of making certain local improvements in the Village of Bellwood, in accordance with the findings of the County Court of Cook County, and to recommend that the Board of Trustees pass an ordinance providing for the levying of a second, or supplemental, assessment to pay for said deficiency, and further compelling said persons to pass said ordinance providing for a second or supplemental assessment, and to cause an assessment roll to be spread, and a petition to be filed in the County Court of Cook County, and a judgment of confirmation obtained thereon, confirming the levying of a second or supplemental assessment, in order to make up the deficiency existing in said assessments.

The petitioners are the owners of special assessment bonds issued in anticipation of the collection of special assessments levied for their payment.

The order appealed from recites that by an order of the County Court of Cook County theretofore entered, there had been a finding that the improvements for which these assessments were levied had been completed; that all the proceedings and the making of said improvements were duly had in compliance with the ordinance; that upon completion, the Board of Local Improvements of the village in said proceeding, had filed its certificate of cost and completion in compliance with Section 84 of said Local Improvement Act in the County Court; that a hearing was had in said County Court on a motion to have the court enter an order finding the facts as were subsequently set out in said certificate to be true, that a final order confirming said certificate be entered; that the improvement has been completed in accordance with the ordinance; that the total cost of the improvement amounts to $636,998.41; that the original assessment as confirmed was for $586.998.41, and that there is a deficiency in the original assessment of $50,000.00. It is thus seen that the County Court in its order found that there was a deficiency in the amount of $50,000.00, and of this there is no denial, nor that the County Court entered this order in compliance with the provisions of the Local Improvement Act. The order for mandamus directed the defendants to proceed, as provided by statute, to levy a special assessment for this amount. There is no question raised but that the petitioners are the owners of unpaid bonds issued against this special assessment, and that the same are due and unpaid.

The theory of the defense is that prior to the filing of the petition for the writ of mandamus, no proper demand had been made as a basis for the relief prayed for, that such demands made were

the petitioners are the owners of special assessment bonds issued in anticipation of the collection of special assessments levied for their payment.

The order appealed from recites that by an order of the County Court of Cook County theretofore entered, there had been a finding that the improvements for which these assessments were levied had been completed; that all the proceedings and the making of said improvements were duly had in compliance with the ordinance; that upon completion, the board of local improvements of the village in said proceeding, had filed its certificate of cost and completion in compliance with section 84 of said Local Improvement Act in the County Court; that a hearing was had in said County Court on a motion to have the court enter an order finding the facts as were subsequently set out in said certificate to be true, that a final order confirming said certificate be entered; that the improvement has been completed in accordance with the ordinance; that the total cost of the improvement amounts to $[illegible],[illegible].41; that the original assessment as confirmed was for $[illegible].41, and that there is a deficiency in the original assessment of $[illegible].00. It is thus seen that the County Court in its order found that there was a deficiency in the amount of $[illegible].00, and if this there is no doubt, nor that the County Court entered this order in compliance with the provisions of the Local Improvement Act. The order for mandamus directed the defendants to proceed, as provided by statute, to levy a special assessment for this amount. There is no question raised but that the petitioners are the owners of unpaid bonds issued against this special assessment, and that the same are due and unpaid.

The theory of the defense is that prior to the filing of the petition for the writ of mandamus, no proper demand had been made as a basis for the relief prayed for, that such demands said were

wholly ineffectual and were not made on the necessary and proper parties. Also, that there were ample assessments levied to pay the plaintiffs' bonds.

The cause was tried on the petition for the writ of mandamus, and the answer thereto filed by the defendants. The petition sets forth the matters subsequently found by the court to be true, including the fact that the County Court had found that the alleged deficiency existed, and there is no denial in the answer of this fact so found by the County Court. The petition recites that the following letters were sent to the persons to whom they were addressed on the dates mentioned:

"Jan. 23, 1934

Village of Bellwood,
Bellwood, Illinois
Attention: Village President.

Gentlemen:

We represent clients who hold the major portion of the bonds issued in anticipation of the collection of Bellwood Special Assessment No. 60625. Upon the hearing of the final certificate of cost and completion the County Court determined that a deficiency exists in this special assessment to the extent of $50,000.00. To date no action has been taken in order to levy a supplemental assessment to take care of this deficiency. We therefore, respectfully request that immediate steps be taken in order to secure the confirmation of a supplemental assessment to take care of this deficiency.

We have taken this matter up with you several times before and have been glad to abide by your wish that action be deferred from time to time. However, our clients are insisting upon action on this matter and we therefore request you take action at once.

Very truly yours,

MARKMAN, DONOVAN & SULLIVAN
By

JPS:S
cc: Mr. James McKeag, Village Attorney,
Mr. George Miller, Village Clerk."

"July 14, 1934.

Village of Bellwood
Bellwood, Illinois
Attention: Village President

Gentlemen:

wholly institutional and were not made on the necessary and proper petition. Also, that there were ample assessments levied to pay the plaintiffs' bonds.

The cause was tried on the petition for the writ of mandamus, and the answer thereto filed by the defendants. The petition sets forth the matters subsequently found by the court to be true, including the fact that the County Court had found that the alleged deficiency existed, and there is no denial in the answer of this fact as found by the County Court. The petition recites that the following letters were sent to the persons to whom they were addressed on the dates mentioned:

"Jan. 23, 1934

Village of Bellwood,
Bellwood, Illinois

Attention: Village President.

Gentlemen:

We represent clients who hold the major portion of the bonds issued in anticipation of the collection of Bellwood Special Assessment No. 20022. Upon the meeting of the final certificate of cost and completion the County Court determined that a deficiency exists in this special assessment to the extent of $20,000.00. To date no action has been taken in order to levy a supplemental assessment to take care of this deficiency. We therefore, respectfully request that immediate steps be taken in order to remove the contamination of a supplemental assessment to take care of this deficiency.

We have taken this matter up with you several times before and have been glad to abide by your wish that action be deferred from time to time. However, our clients are insisting upon action on this matter and we therefore request you take action at once.

Very truly yours,

MAYNARD, CONOVER & SULLIVAN
By

Jos:s

cc: Mr. James McGrew, Village Attorney,
Mr. George Miller, Village Clerk."

"July 16, 1934.

Village of Bellwood
Bellwood, Illinois

Attention: Village President

Gentlemen:

On June 23rd we wrote you a letter with reference to the levy of a supplemental assessment in Bellwood Warrant Number 60625. To date we have received no reply. Unless we receive word from you within one week agreeing to take this action at once, we shall be obliged to file mandamus proceedings to compel you to do so.

Very truly yours,

JPS:S" MARKMAN, DONOVAN & SULLIVAN

"September 28th, 1934.

Honorable William J. Mink,
President, Village of Bellwood,
2728 St Charles Road,
Bellwood, Illinois

RE: Equitable Life Insurance Company vs. Village of Bellwood, Bellwood Special Assessment 60625

Sir:

As you know we represent the Equitable Life Insurance Company of Iowa which is the legal owner and holder of a large number of special assessment bonds issued by the Village of Bellwood to anticipate the collection of the special assessment known and described as Bellwood Special Assessment 60625.

You are further aware that at the time the Village of Bellwood filed its certificate of cost and completion in said improvement proceedings the County Court entered an order on or about the 28th day of November, 1932, finding that there was a deficiency in the original assessment in the sum of $50,000.00.

Demand is hereby made upon you to forthwith institute the necessary proceedings for the levy of a special assessment in the above entitled cause to take care of the deficiency of $50,000.00, as found by the County Court of Cook County. Unless we have definite assurance on or before October 5, 1934, that the Village by its duly constituted officers will take the necessary action to levy a supplemental assessment, we will file mandamus proceedings to compel you to do so.

Yours very truly,

HON:MS MARKMAN, DONOVAN & SULLIVAN
cc: Wm. Miller, Village Clerk,
2726 St. Charles Rd., Bellwood, Ill."

Neither in the brief filed here for the defendants, nor in the oral argument held before this court, was it denied that these documents were received by the village officials, but it is claimed that each member of the Board of Local Improvements and the Board of Trustees of the Village should have been served with a demand notice, asking that a supplemental assessment be levied, and that proper steps be taken in regard thereto. On the hearing on oral argument, it was

On June 22nd we wrote you a letter with reference to the levy of a supplemental assessment in Hollywood Warrant Number 00825. To date we have received no reply. Unless we receive word from you within one week agreeing to take this action at once, we shall be obliged to file mandamus proceedings to compel you to do so.

Very truly yours,

JTM:S" MANEKAN, DONOVAN & SULLIVAN

"September 23rd, 1924.

Honorable William J. Mink,
President, Village of Hollywood,
3725 N. Harlem Ave.,
Hollywood, Illinois

RE: Equitable Life Insurance Company vs. Village of Hollywood, Hollywood Special Assessment 00825

Sir:

As you know we represent the Equitable Life Insurance Company of Iowa which is the legal owner and holder of a large number of special assessment bonds issued by the Village of Hollywood to anticipate the collection of the special assessment known and described as Hollywood Special Assessment 00825.

You are further aware that at the time the Village of Hollywood filed its certificate of cost and completion in said improvement proceedings the County Court entered an order on or about the 25th day of November, 1922, finding that there was a deficiency in the original assessment in the sum of $30,000.00.

Demand is hereby made upon you to forthwith institute the necessary proceedings for the levy of a special assessment in the above entitled cause to make up of the deficiency of $30,000.00, as found by the County Court of Cook County. Unless we have definite assurance on or before October 6, 1924, that the Village by its duly constituted officers will take the necessary action to levy a supplemental assessment, we will file mandamus proceedings to compel you to do so.

Yours very truly,

HOM:MS MANEKAN, DONOVAN & SULLIVAN

cc: Mr. Miller, Village Clerk,
3725 N. Harlem Ave., Hollywood, Ill."

Neither in the brief filed here for the defendants, nor in the oral argument held before this court, was it denied that these documents were received by the village officials, but it is claimed that each member of the Board of Local Improvements and the Board of Trustees of the Village should have been served with a demand notice, asking that a supplemental assessment be levied, and that proper steps be taken in regard thereto. On the hearing on oral argument, it was

admitted that the Board of Trustees of the Village were all members of the Board of Local Improvements of such village at the time these documents were received by them, and it was admitted that in the finding of the County Court referred to, there was found to be a deficiency in the amount of $50,000.00, as alleged, and that such finding was made in accordance with the Local Improvement Act. All of the members of the Board of Local Improvements, therefore, all the members of the Village Board, entered their appearance in the case. We hold that the demand made was sufficient.

It is difficult for us to understand just what defendants' position is in this matter. It is not contended by defendants that the proceeding in the County Court was not had according to law, and that the finding of the County Court of the deficiency in the amount mentioned, is not a final adjudication of that question. The point is raised that inasmuch as the original assessments levied to pay the bonds issued to obtain the funds to pay for the improvement, had not been paid, that, therefore, it would be useless to levy a supplemental assessment. This is not for us to pass upon. Counsel do not contend that under the Local Improvement Act, and under ordinary circumstances, the holders of these bonds, who are the petitioners, would not have the right to have this supplemental assessment spread in order to obtain funds to pay these bonds. We are of the opinion that the court was not in error in ordering the writ to issue. Therefore, the judgment is affirmed.

AFFIRMED.

REBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

admitted that the board of trustees of the Village were all members of the board of local improvements of such village at the time these documents were received by them, and it was admitted that in the finding of the County Court referred to, there was found to be a deficiency in the amount of $30,000.00, as alleged, and that such finding was made in accordance with the local improvement Act. All of the members of the board of local improvements, therefore, all the members of the Village Board, entered their appearance in the case. We hold that the demand made was sufficient.

It is difficult for us to understand just what defendants' position is in this matter. It is not contended by defendants that the proceeding in the County Court was not had according to law, and that the finding of the County Court of the deficiency in the amount mentioned, is not a final adjudication of that question. The point is raised that inasmuch as the original assessments levied to pay the bonds issued to obtain the funds to pay for the improvement, had not been paid, that, therefore, it would be unlawful to levy a supplemental assessment. This is not for us to pass upon. Counsel do not contend that under the local improvement act, and under ordinary circumstances, the holders of these bonds, who are the petitioners, would not have the right to have this supplemental assessment spread in order to obtain funds to pay these bonds. We are of the opinion that the court was not in error in ordering the writ to issue. Therefore, the judgment is affirmed.

AFFIRMED.

HERSH, J. AND DENIS F. SULLIVAN, J. DISSENT.

38401

MATHILDA B. LAUFF,

(Respondent) Appellee,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a corporation,

(Petitioner) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 643

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting a new trial in a suit brought by plaintiff against defendant on an insurance policy. After a trial before the court and a jury, a verdict was returned in favor of plaintiff on May 1st, 1935, for the sum of $3,000.00. Thereafter, on May 4th, 1935, upon the motion of defendant, the court entered judgment in favor of the defendant, notwithstanding the verdict. Subsequently, on June 10th, 1935, upon motion of the plaintiff to grant a new trial in the cause, the court on that date vacated the judgment and granted the parties a new trial. A motion was made here by defendant for leave to appeal from this order, which motion was granted, and, as stated, it is now here on the appeal from the order granting a new trial entered on plaintiff's motion.

The questions involved were only questions of fact, and in view of the fact that the court saw and heard the witnesses, and that reasonable discretion should be allowed trial courts in the matter of granting new trials, the order granting the new trial is, therefore, affirmed. Further, in view of the fact that we are affirming the order of the trial court in granting a new trial, we do not deem it necessary or proper that we discuss or pass upon the merits of the cause.

AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

38401

MATHILDA G. LAURY,

(Respondent) Appellee,

v.

NIAGARA-CONSERVATIVE MUTUAL LIFE INSURANCE COMPANY, a corporation,

(Petitioner) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

204 I.A. 643

MR. PRESIDING JUSTICE BARR DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting a new trial in a suit brought by plaintiff against defendant on an insurance policy. After a trial before the court and a jury, a verdict was returned in favor of plaintiff on May 1st, 1928, for the sum of $3,000.00. Thereafter, on May 4th, 1928, upon the motion of defendant, the court entered judgment in favor of the defendant, notwithstanding the verdict. Subsequently, on June 10th, 1928, upon motion of the plaintiff to grant a new trial in the cause, the court on that date vacated the judgment and granted the motion a new trial. A motion was made here by defendant for leave to appeal from this order, which motion was granted, and, as stated, it is now here on the appeal from the order granting a new trial entered on plaintiff's motion.

The questions involved were only questions of fact, and in view of the fact that the court saw and heard the witnesses, and that reasonable discretion should be allowed trial courts in the matter of granting new trials, the order granting the new trial is, therefore, affirmed. Further, in view of the fact that we are affirming the order of the trial court in granting a new trial, we do not deem it necessary or proper that we discuss or pass upon the merits of the cause.

AFFIRMED.

HEBEL, J. AND DAVIS & SULLIVAN, J. CONCUR.

38048

MORRIS I. KAPLAN, Plaintiff - Appellee, v. EDWARD D. FEINBERG, Defendant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
On Appeal of ABE SCHAFFNER, Third Party, Appellant.	)	284 I.A. 643

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by Abe Schaffner, so-called third party defendant, from a judgment of $1,302.50 in favor of the plaintiff.

The defendant in the action, Edward D. Feinberg, was dismissed upon his motion.

The plaintiff's action was against the defendant, Edward D. Feinberg, for monies collected by him for the plaintiff which the defendant failed to pay. On the 25th day of October, 1934, the defendant filed his affidavit of merits and an answer in the nature of a bill of interpleader, wherein the defendant states that on the 3rd day of October, 1934, a judgment was entered in the case of Abe Schaffner v. Charles Ofner, in the Municipal Court of Chicago, for the sum of $11,452.50, in favor of Abe Schaffner; that on the 4th day of October, 1934, Kaplan, the plaintiff in this action, informed the defendant that one-half of all monies collected by Feinberg in payment or settlement of the judgment belonged to the plaintiff, for the reason that an agreement was entered into between Kaplan and Abe Schaffner; that on the 15th day of October, 1934, Feinberg settled the judgment for $3,635 in cash, a check executed by the plaintiff for $1,000, and certain cancelled promissory notes; that he was instructed by his client, Abe Schaffner, not to pay any part of said sum collected by him on said judgment and to enforce payment of plaintiff's check; that the defendant, Feinberg, had

320648

MORRIS I. KAPLAN, Plaintiff - Appellee, v. EDWARD D. PEINBERG, Defendant.	APPEAL FROM SUPERIOR COURT OF CHICAGO.
On Appeal of ABE SOMMERFIELD, Third Party, Appellant.	264 I.A. 643

MR. JUSTICE HIGGS DELIVERED THE OPINION OF THE COURT:

This is an appeal by Abe Sommerfield, so-called third party defendant, from a judgment of $1,208.80 in favor of the plaintiff.

The defendant in the action, Edward D. Reinberg, was dismissed upon his motion.

The plaintiff's action was against the defendant, Edward D. Reinberg, for monies collected by him for the plaintiff which the defendant failed to pay. On the 28th day of October, 1924, the defendant filed his affidavit of merits and an answer in the nature of a bill of interpleader, wherein the defendant states that on the 3rd day of October, 1924, a judgment was entered in the case of Abe Sommerfield v. Charles Oliver, in the municipal court of Chicago, for the sum of $1,484.80, in favor of the Sommerfield; that on the 4th day of October, 1924, Kaplan, the plaintiff in this action, informed the defendant that one-half of all moneys collected by Reinberg in payment or settlement of the judgment belonged to the plaintiff, for the reason that an agreement was entered into between Kaplan and Abe Sommerfield; that on the 16th day of October, 1924, Reinberg settled the judgment for $1,625 in cash, a check executed by the plaintiff for $1,208, and certain unsolicited tendering notes; that he was instructed by his client, the Sommerfield, not to pay any part of said sum collected by him on said judgment and to enforce payment of plaintiff's check; that the defendant, Reinberg, and

no interest in said sum held by him, and that he desired to bring the sum for which he was being sued into court.

On November 1, 1934, an order was entered by the court on the application of Edward D. Feinberg that Abe Schaffner be made a third party defendant and that summons issue.

On November 7, 1934, Abe Schaffner filed a notice and made a motion for leave to intervene, which motion was allowed.

Thereafter, on November 13, 1934, Schaffner filed his sworn answer in which he denied that he had promised the plaintiff to pay him one-half of the amount recovered in the settlement of the judgment in the case entitled Schaffner v. Ofner in the Municipal Court of Chicago; and he further answered that the plaintiff was indebted to Schaffner in the sum of $6,853.20. Defendant Schaffner prays that the defendant Feinberg pay to him the sum withheld by him, evidenced by checks for $1,000 and $302.50, which were subsequently reduced to cash.

An affidavit for garnishee summons was filed on the 17th day of December, 1934, directed to Edward D. Feinberg. Feinberg filed his answer on December 26, 1934, in which he states that at the time he was dismissed as a party defendant, from the above entitled cause, he was instructed by the trial court to retain the sum of $1,302.50, which he collected as attorney in the case of Schaffner v. Ofner, in the proceeding then pending in the Municipal Court; that on the 17th day of December, 1934, he was served with notice of assignment by one Nathan Raffelman, and a demand, directed to Feinberg, that he Feinberg pay to the assignee the sum in his hands.

The intervening petition of Nathan Raffelman was filed on the 3rd day of January, 1935, setting up assignment to him by Abe Schaffner on the 15th day of October, 1934, of the sum of $1,302.50, then in the hands of Edward D. Feinberg, as attorney

no interest in said sum held by him, and that he desired to bring the sum for which he was going into court.

On November 1, 1924, an order was entered by the court on the application of Edward D. Feinberg that the Schaffner be made a third party defendant and that summons issue.

On November 7, 1924, the Schaffner filed a notice and made a motion for leave to intervene, which motion was allowed.

Thereafter, on November 13, 1924, Schaffner filed his sworn answer in which he denied that he had promised the plaintiff to pay him one-half of the amount recovered in the settlement of the judgment in the case entitled Schaffner v. Oliver in the Municipal Court of Chicago; and he further answered that the plaintiff was indebted to Schaffner in the sum of $6,852.30. Defendant Schaffner prays that the defendant Feinberg pay to him the sum withheld by him, evidenced by checks for $1,000 and $302.50, which were subsequently tendered to court.

An affidavit for garnishee summons was filed on the 17th day of December, 1924, directed to Edward D. Feinberg. Feinberg filed his answer on December 26, 1924, in which he states that at the time he was discharged as a party defendant, from the above entitled cause, he was instructed by the trial court to retain the sum of $1,302.50, which he collected as attorney in the case of Schaffner v. Oliver, in the proceeding then pending in the Municipal Court; that on the 17th day of November, 1924, he was served with notice of assignment by one William Sullivan, and a demand, directed to Feinberg, that he Feinberg pay to the assignee the sum in his hands.

The intervening petition of William Sullivan was filed on the 3rd day of January, 1925, setting up assignment to him by Abe Schaffner on the 15th day of October, 1924, of the sum of $1,302.50, then in the hands of Edward D. Feinberg, as attorney

for said Schaffner; that pursuant to said assignment Raffelman served personal notice upon Feinberg and demanded of him the said sum.

Motion of plaintiff was filed January 4, 1935, to vacate the order dismissing Feinberg as defendant and for judgment in favor of the plaintiff and against Feinberg in the sum of $1,302.50.

Hearing of the motion of plaintiff was continued to January 7, 1935. On January 5, 1935, a certain notice of appeal was filed in the office of the clerk of said court by Abe Schaffner, giving notice that he appeals from the final judgment entered in this cause on December 17, 1934, whereby it was adjudged that the issues be found against the defendant, Abe Schaffner.

On January 7, 1934, an order was entered sustaining the motion of plaintiff to vacate that part of the order entered December 17, 1934, dismissing the case as to Edward D. Feinberg, and an order was then entered finding the issues against the defendant Feinberg assessing the damages in the sum of $1,302.50, and judgment on the finding for said sum against Edward D. Feinberg and in favor of the plaintiff, and that execution issue.

Thereafter on January 8, 1935, on motion of the plaintiff, the garnishee, Edward F. Feinberg was released and discharged as garnishee.

Upon stipulation of the plaintiff and Feinberg, an order was entered on the 23rd day of February, 1935, wherein the court vacated and set aside the judgment against Feinberg heretofore entered on January 7, 1935, vacated the order of January 8, 1935, discharging the garnishee, and a hearing was had on garnishee's answer, and the court thereupon entered judgment against the garnishee, Edward D. Feinberg for $1,295.50 in favor of the plaintiff - judgment being satisfied in full of record.

for said Sonefiner; that pursuant to said assignment affidavit served personal notice upon Rainsey and demanded of him the said sum.

Motion of plaintiff was filed January 4, 1935, to vacate the order dismissing Rainsey as defendant and for judgment in favor of the plaintiff and against Rainsey in the sum of $1,[illegible].

Hearing of the motion of plaintiff was continued to January 7, 1935. On January 8, 1935, a certain notice of appeal was filed in the office of the clerk of said court by the defendant, giving notice that he appeals from the final judgment entered in this cause on December 17, 1934, whereby it was adjudged that the issues be found against the defendant, the defendant.

On January 7, 1935, an order was entered overruling the motion of plaintiff to vacate that part of the order entered December 17, 1934, dismissing the case as to Edward G. Rainsey, and an order was then entered finding the issues against the defendant Rainsey assessing the damages in the sum of $1,[illegible].50, and judgment on the finding for said sum against Edward G. Rainsey and in favor of the plaintiff, and that execution issue.

Thereafter on March 7, 1935, on motion of the plaintiff, the guarantee, Edward G. Rainsey was released and discharged as guarantee.

Upon stipulation of the plaintiff in error, an order was entered on the 22nd day of February, 1935, wherein the court vacated and set aside the judgment against Rainsey heretofore entered on January 7, 1935, vacated the order of January 8, 1935, discharging the guarantee, and a [illegible] was had on [illegible] answer, and the court thereon entered judgment against the guarantee, Edward G. Rainsey for $1,[illegible].50 in favor of the plaintiff - judgment being satisfied in full of record.

The first question that confronts this court is the admission by the plaintiff that the judgment against Abe Schaffner was inadvertently entered by the court under a misapprehension as to its power. This judgment, as suggested by the plaintiff, was subsequently paid by the garnishee, and the judgment against Abe Schaffner was satisfied of record, notwithstanding his notice of appeal filed on January 5, 1935. Therefore plaintiff contends that the trial court should have entered a proper judgment to carry into effect its ruling "that the money belonged to Kaplan (the plaintiff)." Having failed to do so, this court should exercise the power granted to it by Sec. 92, Ch. 110, of the Civil Practice Act, which provides, in part, as follows:

> "(f) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require."

By plaintiff's admission of this error, he desires this court to review the record, or in other words, act as the trial court should have done and correct this admitted error by determining the merits of the controversy. The so-called third party, Abe Schaffner, was obliged to appeal in order to have his rights adjudicated, and, as the plaintiff now admits, the error corrected. This court is not willing to pass upon the merits of the controversy and to correct the error by entering a proper judgment. The purpose of this act is not to give this court the power to retry cases on appeal and to enter a judgment, notwithstanding the judgment entered by the trial court.

It is apparent from the record that the controversy on appeal was not disposed of by the trial court in the manner provided by law. The record shows that subsequent proceedings were had in

The first question that confronts this court in the admission by the plaintiff that the judgment against the defendant was inadvertently entered by the court under a misapprehension as to its power. This judgment, as suggested by the plaintiff, was subsequently paid by the garnishee, and the judgment against the defendant was satisfied of record, notwithstanding his notice of appeal filed on January 5, 1970. Therefore plaintiff contends that the trial court should have entered a proper judgment to carry into effect its ruling "that the money belonged to appellant (the plaintiff)." Having failed to do so, this court should exercise the power granted to it by sec. 87, ch. 110, of the Civil Practice Act, which provides, in part, as follows:

> "(1) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grants such relief, including a remand, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of a mandate, as the case may require."

By plaintiff's admission of this error, he seeks this court to review the record, or in other words, act as the trial court should have done and correct this admitted error by determining the merits of the controversy. The so-called trial court, the defendant, was obliged to regard in order to make its rights adjudicated, too, as the plaintiff's rights were concerned. This court is not willing to [illegible] upon the merits [illegible] versy and to correct the error by entering [illegible] judgment. The purpose of this rule is not to [illegible] over to [illegible] cases on appeal and to enter a judgment, substituting the judgment entered by the trial court.

It is apparent from the record that the garnishee on appeal was not discharged of by the trial court in [illegible] by law. The record shows that [illegible] in

the instant case between the plaintiff and Feinberg, the original defendant, and it appears that the order dismissing this defendant was set aside by the court and a hearing had, and judgment entered by the court against Feinberg as garnishee, which he paid. It is contended that the judgment as to Abe Schaffner was satisfied, and therefore is a moot question.

It appears that this subsequent proceeding is not properly before this court upon Abe Schaffner's appeal, and cannot be considered in determining the merits as between Schaffner and the plaintiff. The plaintiff by this step, apparently, hopes to deprive this defendant of his day in court. We are not interested as to whether the garnishee is protected by the garnishment proceedings and the payment of the judgment; we are only concerned as to the merits of the case on appeal here.

In view of this admission that a proper judgment was not entered, this cause must be reversed, and in order that the parties may be heard on the merits, the judgment here on appeal by the defendant Schaffner is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

the instant case between the plaintiff and Feinberg, the original defendant, and it appears that the order dismissing this defendant was not made by the court and a hearing had, and judgment entered by the court against Feinberg as garnishee, which he paid. It is contended that the judgment as to the garnisher was satisfied, and therefore is a moot question.

It appears that this amendment proceeding is not properly before this court upon the garnisher's appeal, and cannot be considered in determining the merits as between garnisher and the plaintiff. The plaintiff by this step, apparently, hopes to deprive this defendant of his day in court. We are not interested as to whether the garnishee is protected by the garnishment proceedings and the payment of the judgment; we are only concerned as to the merits of the case on appeal here.

In view of this adjudication that a proper judgment was not entered, this cause must be reversed, and in order that the parties may be heard on the merits, the judgment here on appeal by the defendant garnisher is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. and DENIS M. SULLIVAN, J. CONCUR.

38061

DANIEL BAZAR,

Plaintiff - Appellee,

v.

PETER B. SCHYMAN and HELEN SCHYMANSKI,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

284 I.A. 643

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal of the defendants in this court is from a judgment entered in the Circuit Court of Cook County in favor of the plaintiff for the sum of $4500 for damages alleged to have been sustained by reason of the mal practice of the defendants in the medical treatment of the plaintiff.

The plaintiff was 67 years of age and was working as a laborer in the building trades. On October 21, 1927, he was suffering from a severe case of biliousness, and called on the defendants for treatment. After consultation he received six treatments. No improvement having resulted from these treatments, he was advised by the defendants that they would apply a certain electric machine, known as a diathermia machine. In the use of the machine the plaintiff was put on a table and plates were placed on his body which were attached to electric current wires. The current was turned on for twenty minutes. During this time no attendant was present to control the current; the plates became very hot, and the plaintiff screamed and became unconscious. The doctor applied restoratives then told plaintiff that they would treat him for the burn, which had been caused by a wire becoming unfastened from one of the plates. At the time these plates were attached to the electric wires and placed on plaintiff's naked body he was told not to move. However, he complained to the doctor that the plates were getting very hot, but was advised that everything

38081

DANIEL BAZAR, Plaintiff - Appellee,	APPEAL FROM
v.	CIRCUIT COURT
PETER B. SOHYMAN and HELEN SOHYMANSKI, Defendants - Appellants.	COOK COUNTY.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal of the defendants in this court is from a judgment entered in the Circuit Court of Cook County in favor of the plaintiff for the sum of $4500 for damages alleged to have been sustained by reason of the malpractice of the defendants in the medical treatment of the plaintiff.

The plaintiff was 67 years of age and was working as a laborer in the building trades. On October 21, 1927, he was suffering from a severe case of biliousness, and called on the defendants for treatment. After consultation he received six treatments. No improvement having resulted from these treatments, he was advised by the defendants that they would apply a certain electric machine, known as a diathermic machine. In the use of the machine the plaintiff was put on a table and plates were placed on his body which were attached to electric current wires. The current was turned on for twenty minutes. During this time no attendant was present to control the current; the plates became very hot, and the plaintiff screamed and became unconscious. The doctor applied restoratives then told plaintiff that they would treat him for the burn, which had been caused by a wire becoming unfastened from one of the plates. At the time these plates were attached to the electric wires and placed on plaintiff's naked body he was told not to move. However, he complained to the doctor that the plates were getting very hot, but was advised that everything

was all right. Thereupon the doctor left the room, and the other defendant, Helen Schymanski, also left the room a few minutes later.

The defendants who were treating this patient held themselves out as being qualified to administer medical aid. From the record it appears that Helen Schymanski prepares and deals in herb medicines, and is the mother of the defendant Peter B. Schyman, who is a regular licensed physician.

It appears to be clear that as a result of the treatment by this electric machine, plaintiff's back was severely burned, and the controverted question of fact is as to the condition of the plaintiff resulting from this burn.

The plaintiff offered evidence that the burn was what is known as a third degree burn, which became infected and swollen, and was one and one-half inches deep through the heavy muscles of his back clear to the spine, and was about four inches wide and six inches long, from which the flesh rotted and sloughed out and pus constantly drained; and that the wound did not heal for about six months after the burn was inflicted.

The evidence tends to establish the theory that the plaintiff, as a result of this burn, is now suffering from chronic Bright's disease, or nephritis, and that because of this injury the plaintiff is unable to work; that his condition of weakness has made it impossible for him to do the kind of work he was formerly employed to do.

The evidence further shows that plaintiff was treated by other physicians for a period of thirteen months after the injury, that he was confined to his bed in a hospital for a period of three weeks, and then at his home for six months; that he was still suffering pain at the time of the trial; that he incurred a physician's bill of $140, and expended $34.00 for medicines, bandages and dressings during the six months his open wound was infected and draining.

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The evidence further shows that plaintiff was treated by other physicians for a period of thirteen months after the injury, that he was confined to his bed in a hospital for a period of three weeks, and then at his home for six months; that he was still suffering pain at the time of the trial; that he incurred a physicians bill of $140, and expended $24.00 for medicines, bandages and dressings during the six months his open wound was infected and draining.

The defendants contend that the Bright's disease from which the plaintiff is now suffering is not the result of the burn inflicted by this electric machine. Dr. Schyman, one of the defendants, testified that the plaintiff had this disease when he first appeared for an examination.

There is also evidence in the record by physicians, who testified as medical experts, that it is important to have someone remain in attendance when this electric machine is applied to the naked body of a patient.

All these facts were before the jury, and it was for them to determine whether or not the electric machine that inflicted the injury to the plaintiff was negligently operated, or whether as a result of this injury the plaintiff is now suffering from a chronic case of nephritis. From the record, we believe that there was sufficient evidence to justify the court in permitting the jury to pass upon these facts.

The defendants complain of a number of instructions given to the jury, on the ground that they were confusing. We have examined the record to ascertain whether the defendants objected to the giving of the instructions, and find that no objection was made, and for that reason they are not in a position to raise this question for the first time in this court. Objection should be made at the time of the trial, so that when argument for a new trial is heard by the court, the matter may be called to his attention and he be given an opportunity to rule upon this very question.

The court during the course of the trial submitted a special interrogatory to the jury which had been prepared by the plaintiff, and it is strenuously argued by the defendants that this special interrogatory was not submitted to the defendants before it was presented to the jury. While objection to the special interrogatory is made in this court, we are unable to find from an

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examination of the abstract filed by the defendants that any objection was made upon the trial of the case.

The defendants contend that the court erred in denying the defendants' motion for leave to withdraw a juror because of the conduct of plaintiff's counsel in making it appear to the jury that the defendant Dr. Schyman at some past time was punished by the U. S. Government for misuse of the United States mail. It appears, however, from the record that upon objection of the defendants, plaintiff's counsel withdrew the question, and the court instructed the jury to disregard this evidence. While it is true that it is improper for the plaintiff upon cross-examination to inquire, as was done in this particular case, as to some irrelevant fact regarding a previous trial in which the defendant was involved, we are of the opinion that no prejudicial error occurred by reason of the question to which objection was made.

The facts in this particular case are clear that the plaintiff called upon the defendants for medical treatment and as a result of the administered treatments the defendants, in negligently operating the electric machine in question, caused the plaintiff's back to be seriously injured by a burn of considerable size, and there is no element of dispute that this actually occurred. Therefore, we do not believe from the record that the jury was influenced to any extent by the question that was objected to by the defendants.

The evidence indicates that the plaintiff is permanently injured and that the amount of the verdict is not excessive.

We have considered the objections made by the defendants, and are of the opinion that the court did not err in the trial of the case. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

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The evidence indicates that the plaintiff is permanently injured and that the amount of the verdict is not excessive.

We have considered the objections made by the defendants, and are of the opinion that the court did not err in the trial of the case. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HAML, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

38091

JAMES SULLIVAN, Plaintiff - Appellee, v. W. R. WELDON, Defendant - Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.
SUE CLARA SULLIVAN, Plaintiff - Appellee, v. W. R. WELDON, Defendant - Appellant.	)	284 I.A. 644

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from judgments entered in the Circuit Court of Cook County in the case of James Sullivan v. W. R. Weldon, defendant, for the sum of $500, and in the case of Sue Clara Sullivan against the same defendant for the sum of $1500. These cases were consolidated by agreement, and pursuant to the provisions of the Civil Practice Act. They were submitted to the jury. The actions were by the plaintiffs to recover from the defendant for injuries sustained by the plaintiffs while riding in the defendant's automobile, which it is claimed was operated in a negligent manner.

The plaintiffs are husband and wife and were at the time of the accident, on November 24, 1930, living in Northbrook, Illinois. The plaintiff James Sullivan, was the owner of an Auburn automobile, which the plaintiffs had driven to Chicago on the day in question and which was left at a repair shop on Michigan Avenue. Later the plaintiffs were driven to their home in Northbrook, Illinois by a Mr. Hanning's chauffeur. The plaintiffs were acquainted with the defendant for about ten years prior to the date of the accident. When the plaintiffs arrived at their home about five o'clock in the afternoon, William Sullivan, brother of the plaintiff, James Sullivan, and the defendant were there.

38041

James SULLIVAN,

Plaintiff - Appellee,

v.

F. E. WELDON,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

SUE CLARK SULLIVAN,

Plaintiff - Appellee,

v.

F. E. WELDON,

Defendant - Appellant.

COOK COUNTY.

Mr. JUSTICE TOOLE DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from judgments entered in the Circuit Court of Cook County in the case of James Sullivan v. F. E. Weldon, defendant, for the sum of $500, and in the case of Sue Clark Sullivan against the same defendant for the sum of $1500. These cases were consolidated by agreement, and appeared to the pretrial of the Civil Practice Act. They were submitted to the jury. The actions were by the plaintiffs to recover from the defendant for injuries sustained by the plaintiffs while riding in the defendant's automobile, which it is claimed was operated in a negligent manner.

The plaintiffs are husband and wife and were at the time of the accident, on November 4, 1930, living in Jacksonville, Illinois. The plaintiff James Sullivan, was the owner of an Hudson automobile, which the plaintiffs had driven to Chicago on the day in question and which was left at a repair shop on Michigan Avenue. Later the plaintiffs were driven to their home in Jacksonville, Illinois by a Mr. Reynolds, a mutual friend. The plaintiffs were requested with the defendant for that the plaintiff to the place of the accident. When the plaintiffs arrived at their home about five o'clock in the afternoon, Gillis Sullivan, brother of the plaintiff, James Sullivan, and the defendant were there.

The plaintiffs invited the defendant to stay to dinner, which he did. During the course of the conversation at dinner, Sue Clara Sullivan discussed the trip the plaintiffs were about to make to Cedar Rapids, Iowa. She told the defendant that the plaintiffs had left their car at the Auburn place for repair, and had no way of connecting with the midnight train at the Chicago Northwestern Station, Chicago, unless they had someone to drive them there. She testified that her brother-in-law, William Sullivan, was present at the conversation, and that the defendant at the time stated he would be pleased to have William Sullivan drive them to the station in his car, which was then in the possession of Sullivan, and the defendant stated to the brother of the plaintiff, "Billy, you take Sue and Jimmie to the train," for Cedar Rapids at midnight from the Chicago and Northwestern Station in Chicago. He also said, "Billy, see that they get to the train on time."

The record shows that the defendant was manufacturers' agent, selling automobile accessories; that his place of business was at 1408 South Michigan Avenue, Chicago; that at that time he owned two automobiles, one a Ford and the other a Graham-Paige; that on that evening he was driving his Graham-Paige automobile to Milwaukee on business and stopped to visit William Sullivan. Prior to the date of the accident, the defendant, having had use for but one automobile delivered the Ford automobile to William Sullivan for the convenience of Sullivan in coming from and going to Northbrook.

The defendant testified that plaintiffs' brother William Sullivan was not on November 24, 1930, either in the evening or in the daytime, employed by him in any manner; nor was he on any errand for him at the time of the accident or during the day, and was not on defendant's payroll.

the plaintiffs invited the defendant to stay to dinner, which he did. During the course of the conversation at dinner, the Clara Sullivan discussed the trip the plaintiffs were about to make to Cedar Rapids, Iowa. She told the defendant that the plaintiffs had left their car at the Auburn place for repair, and had no way of connecting with the midnight train at the Chicago Northwestern station, Chicago, unless they had someone to drive them there. She testified that her brother-in-law, William Sullivan, was present at the conversation, and that the defendant at the time stated he would be pleased to have William Sullivan drive them to the station in his car, which was then in the possession of Sullivan, and the defendant stated to the brother of the plaintiff, "Bill, you take her and Jimmie to the train," for Cedar Rapids at midnight from the Chicago and Northwestern Station in Chicago. He also said, "Bill, see that they get to the train on time."

The record shows that the defendant was manufacturers' agent, selling automobile accessories; that his place of business was at 1408 South Michigan Avenue, Chicago; that at that time he owned two automobiles, one a Ford and the other a Dodge-Brothers; that on that evening he was driving his Dodge-Brothers automobile to Kilmarnock on business and stopped to visit William Sullivan. Prior to the date of the accident, the defendant, having had use for but one automobile delivered the Ford automobile to William Sullivan for the convenience of Sullivan in coming from and going to Northbrook.

The defendant testified that plaintiffs' brother William Sullivan was not on November 24, 1930, either in the evening or in the daytime, employed by him in any manner; nor was he on any errand for him at the time of the accident or during the day, and was not on defendant's payroll.

From the evidence it appears that the weather on the night of the accident was cold and rainy and the roadway was slippery; that both of the plaintiffs asked their brother to drive a little slower; that while they were going round a curve near the Harms Road they noticed an oncoming car on the highway. The plaintiff Sue Clara Sullivan, testified that the oncoming automobile was travelling at a very fast rate of speed; had bright lights on and it seemed to be in the middle of the road, and just as the oncoming car reached the automobile in which they were driving, "it seemed to push - William Sullivan seemed to turn the wheel and go off the road and that is all I remember."

The plaintiff James Sullivan, who was also called as a witness, testified, in regard to the question of the direction to William Sullivan to use this car, that at the dinner table he said to his wife that he had to go to the Northwestern Station, and that the train was leaving at 11 o'clock for Cedar Rapids and that the defendant told plaintiffs' brother to drive these plaintiffs into Chicago and use his car; that the defendant left the home of the Sullivans about 8:30 or 9 o'clock for Milwaukee; that the Ford automobile owned by W. R. Weldon was used for the trip to Chicago, and that at the time they left for Chicago he, one of the plaintiffs, was seated in the front seat to the right of the driver; that in driving they came in on Waukegan Road, turned east on Dempster street and south on Lincoln avenue; that plaintiff's wife, who was also in the car, suggested that the brother was driving a little too fast, that she was nervous; that he told the driver to slow up; that he looked at the speedometer and it indicated between 35 and 40 miles an hour; that there was a curve in the road before they reached Harms Road; that plaintiff noticed that it was foggy and misting outside; that William Sullivan did not reduce his speed; that plaintiff noticed a car coming towards them, "and could not tell whether he was in the center of the road or on

From the evidence it appears that the weather on the night of the accident was cold and rainy and the roadway was slippery; that both of the plaintiffs asked their brother to drive a little slower; that while they were going round a curve near the Barum Road they noticed an oncoming car on the highway. The plaintiff Ada Clare Sullivan, testified that the oncoming automobile was travelling at a very fast rate of speed; had bright lights on and it seemed to be in the middle of the road, and just as the oncoming car reached the automobile in which they were driving, "it seemed to pass - William Sullivan seemed to turn the wheel and go off the road and that is all I remember."

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the side of the road; when I saw him he was about 300 feet away. The next thing I knew the car was off the road over the sidewalk into a vacant lot"; that the car turned over twice, and the plaintiffs were injured.

It also appears from the evidence that on December 19, 1930, about 25 days after the accident, the plaintiff, Sue Clara Sullivan, signed a statement in which she stated among other things: "In my opinion northbound car was absolutely at fault - as it was impossible to avoid accident." On the same day, December 19, 1930, the plaintiff, James H. Sullivan signed a statement in which, among other things, he stated: "In my opinion driver of northbound car was absolutely at fault."

Neither of the parties to this litigation called William Sullivan the driver of the car, as a witness, although he was living at Lake Villa, Illinois, about 50 miles from Chicago, and there is evidence in the record from which it seems that he was in communication with James Sullivan on the Sunday night previous to the trial.

The defendant contends as a ground for reversal that the evidence in the case tends to show that the plaintiffs' brother William Sullivan was not on November 24, 1930, a servant or employee of the defendant; that at the time he was not engaged in the furtherance of defendant's business in any manner, but was engaged solely for the benefit and convenience of the plaintiffs.

In the use of this Ford automobile owned by the defendant, William Sullivan was directed to take the plaintiffs to the Northwestern Railroad Station for the purpose of taking a midnight train to Cedar Rapids, Iowa, and being so directed William Sullivan, in the use of this automobile, was acting at the request of the defendant and for that reason was his agent, and the defendant would

the side of the road; when I saw him he was about 300 feet away. The next thing I knew the car was off the road over the sidewalk into a vacant lot"; that the car turned over twice, and the plaintiffs were injured.

It also appears from the evidence that on December 18, 1930, about 8 days after the accident, the plaintiff, Ruth Clara Sullivan, signed a statement in which she stated among other things: "In my opinion northbound car was absolutely at fault - as it was impossible to avoid accident." On the same day, December 18, 1930, the plaintiff, James H. Sullivan signed a statement in which, among other things, he stated: "In my opinion driver of northbound car was absolutely at fault."

Neither of the parties to this litigation called William Sullivan the driver of the car, as a witness, although he was living at Lake Villa, Illinois, about 50 miles from Chicago, and there is evidence in the record from which it seems that he was in communication with Ruth Sullivan on the Sunday night previous to the trial.

The defendant contends as a ground for reversal that the evidence in the case tends to show that the plaintiffs' brother William Sullivan was met on November 30, 1930, a servant or employee of the defendant; that at the time he was not engaged in the furtherance of defendant's business in any manner, but was engaged solely for the benefit and convenience of the plaintiffs.

In the use of this automobile owned by the defendant, William Sullivan was directed to take the plaintiffs to the Northwestern Railroad Station for the purpose of catching a midnight train to Lake Villa, Iowa, and going as directed by William Sullivan. In the use of this automobile, was acting at the request of the defendant and for such reason was his agent, and the defendant would

properly be charged with the negligence of this driver, who was in control of the car at the time of the accident.

The plaintiffs have cited two cases, one of which is the case of Nalli v. Peters, 241 N. Y. 177, wherein it appears from the facts that Peters promised to take Nalli, a friend, for a pleasure trip in his automobile; that Peters being unable to go, requested Mondrone to drive Nalli on the trip. On this trip Nalli was killed as the result of the negligence of Mondrone and suit was brought against Peters. The recovery was sustained by the court. It also appears that the driver was not a regular employee of the defendant, and, apparently, received no compensation for making the trip. The principal purpose of the trip was for the convenience of Nalli, and the court said:

> "The liability for the acts of another is not dependent upon the strict relationship of master and servant, but upon relationship of similar nature, where one acts for another, at his request, express or implied, for his benefit, and under his direction. Under such circumstances, the negligence of the agent is the negligence of the master or the principal."

This opinion was concurred in by all of the then judges of the New York Court of Appeals. In the other case entitled Gannan v. Dupree, 294 S. W. 298, wherein a similar question to the one involved in the instant case arose, it appears that the defendant and others were going on a picnic; that the defendant drove her car part of the way and then left it to ride in another automobile. She requested one Taylor to drive her car and requested plaintiff, a nephew of Taylor, to ride in the car with him. The plaintiff was injured as a result of the negligence of Taylor, and a recovery against defendant was upheld by the Texas Court. In passing upon the relationship between the defendant and Taylor, the court said:

> "When he (Taylor) was directed to assume, and was intrusted with, control of the automobile as a driver, he was, for all purposes of a driver, her (defendant's)

properly be charged with the negligence of this driver, who was in control of the car at the time of the accident.

The plaintiffs have cited two cases, one of which is the case of Kelly v. Estate, 241 N. Y. 177, wherein it appears from the facts that Peters promised to take Kelly, a friend, for a pleasure trip in his automobile; that Peters being unable to go, requested Mondrone to drive Kelly on the trip. On this trip Kelly was killed as the result of the negligence of Mondrone and suit was brought against Peters. The recovery was sustained by the court. It also appears that the driver was not a regular employee of the defendant, and, apparently, received no compensation for making the trip. The principal purpose of the trip was for the convenience of Kelly, and the court said:

> "The liability for the acts of another is not dependent upon the strict relationship of master and servant, but upon relationship of similar nature, where one acts for another, at his request, express or implied, for his benefit, and under his direction. Under such circumstances, the negligence of the agent is the negligence of the master or the principal."

This opinion was concurred in by all of the then judges of the New York Court of Appeals. In the other case entitled Dennis v. Dwyer, 234 N. Y. 229, wherein a similar question to the one involved in the instant case arose, it appears that the defendant and others were going on a picnic; that the defendant drove her car part of the way and then left it to ride in another automobile. The requested one Taylor to drive her car and requested plaintiff, a nephew of Taylor, to ride in the car with him. The plaintiff was injured as a result of the negligence of Taylor, and a recovery against defendant was upheld by the Texas Court. In passing upon the relationship between the defendant and Taylor, the court said:

> "When he (Taylor) was directed to assume, and was intrusted with, control of the automobile as a driver, he was, for all purposes of a driver, her (defendant's)

> representative or special servant in legal view; and, if careless, and injury resulted to occupants of the car, the owner was liable to the same extent as if he were the regularly employed driver."

And the court in that case further said:

> "Although the appellee (plaintiff) paid no fare, yet he was lawfully in the automobile, being expressly invited and directed by the appellant herself to ride therein for passage to the end of the journey contemplated; and the duty arose on the part of appellant to use reasonable care to transport and set him down safely at the point of destination."

In another case passed upon by the Supreme Court of Massachusetts, Campbell v. Arnold, 319 Mass. 160, the court upheld a finding of liability on these facts: Plaintiff was a guest of the defendant. Other guests coaxed the defendant to take them riding. The defendant finally said, "Well, you can go if you want to, but don't be gone very long;" at the same time taking from his pocket the key to the automobile and throwing it down. Thompson, one of the guests who had previously been in the employ of the defendant, took the key and took all of the guests riding. Plaintiff was injured because of Thompson's negligent driving of the automobile, and the court there said:

> "His (defendant's) conduct in delivering the key, by which alone the automobile could be started, under all the circumstances disclosed, would support a finding that, notwithstanding his protestations of reluctance and without express authority, the defendant nevertheless impliedly empowered Thompson as his representative to take his car for the purpose of gratifying the desires of his women guests for an automobile ride."

While we have not been able to find a case directly in point and bearing on the facts in the instant case in this state, still it appears that the defendant at the time directed William Sullivan to take the plaintiffs to the train, and in so doing impliedly invited them to ride to the train in his car and they then became invitees or guests. The defendant in this case relies in part upon the case of Paulsen v. Cochfield, 278 Ill. App. 596. From the facts in that case it appears that Paulsen, plaintiff's

> representative or special servant in legal view; and, if negligent, and injury resulted to occupants of the car, the owner was liable to the same extent as if he were the regularly employed driver."

And the court in that case further said:

> "Although the appellee (plaintiff) paid no fare, yet he was lawfully in the automobile, being expressly invited and directed by the appellant herself to ride therein for passage to the end of the journey contemplated; and the duty arose on the part of appellant to use reasonable care to transport and set him down safely at the point of destination."

In another case passed upon by the Supreme Court of Massachusetts, Campbell v. Arnold, 218 Mass. 180, the court upheld a finding of liability on these facts: Plaintiff was a guest of the defendant. Other guests coaxed the defendant to take them riding. The defendant finally said, "all, you can go if you want to, but don't be gone very long;" at the same time taking from his pocket the key to the automobile and throwing it down. Thompson, one of the guests who had previously been in the employ of the defendant, took the key and took all of the guests riding. Plaintiff was injured because of Thompson's negligent driving of the automobile, and the court there said:

> "His (defendant's) conduct in delivering the key, by which alone the automobile could be started, under all the circumstances disclosed, would support a finding that, notwithstanding his protestations of reluctance and without express authority, the defendant nevertheless impliedly empowered Thompson as his representative to take his car for the purpose of gratifying the desires of his women guests for an automobile ride."

While we have not been able to find a case directly in point and bearing on the facts in the instant case in this state, still it appears that the defendant at the time directed Allen Sullivan to take the plaintiffs to the train, and in so doing impliedly invited them to ride to the train in his car and they then became invitees or guests. The defendant in this case relies in part upon the case of Hudson v. Goodfield, 274 Ill. App. 300. From the facts in that case it appears that Hudson, plaintiff's

intestate, inquired of Laubscher if he could borrow his sister's (defendant's) car so they could drive to Chicago; that Paulsen requested the defendant to lend her car to Laubscher and Paulsen for the purpose of making the trip. It appears that in that case proof of defendant's ownership raised a presumption that the driver was the defendant's agent, and in case of an automobile accident, proof of defendant's ownership of the car involved raised the presumption that the person operating the car was defendant's agent and that he was acting within the scope of his agency, which presumption made out a prima facie case for the plaintiff as far as the particular agency was concerned. Where, however, the plaintiff makes a prima facie case and defendant's affirmative defense involves a negative, defendant must go forward with evidence or suffer the result of the prima facie case made by plaintiff. The testimony of one uncontradicted and unimpeached witness, tending to overcome a prima facie case, cannot be ignored by the court or jury, unless such testimony from its nature is not credible. The court in that case held that the evidence of the defendant had overcome this presumption, and, from the facts, they reached the conclusion that the driver, Laubscher was not the agent of the defendant.

This case does not aid us to the extent plaintiff contends, for the reason that here we have facts which clearly indicate that the defendant directed William Sullivan to use his Ford automobile for the purpose of taking the plaintiffs to the railroad station in Chicago, and in doing so William Sullivan, the driver, at the direction of defendant, conveyed the plaintiffs as the guests of the defendant, to the station in question and acted as agent of the defendant.

One other question of vital importance arises, and that is: Did this driver negligently operate the Ford automobile at the

intended, instead of wondered if he could borrow his sister's (defendant's) car so they could drive to Chicago; that Fuelsen requested the defendant to lend her car to Lundgren and Fuelsen for the purpose of making the trip. It appears to be that case proof of defendant's ownership raised a presumption that the driver was the defendant's agent, and in case of an automobile accident, proof of defendant's ownership of the car involved raised the presumption that the person operating the car was defendant's agent and that he was acting within the scope of his agency, which presumption made out a prima facie case for the plaintiff as far as the particular agency was concerned. There, however, the plaintiff makes a prima facie case and defendant's affirmative defense involves a negative, defendant must go forward with evidence or suffer the result of the prima facie case made by plaintiff. The testimony of one uncontradicted and unimpeached witness, tending to overcome a prima facie case, cannot be ignored by the court or jury, unless such testimony from its nature is not credible. The court in that case held that the evidence of the defendant had overcome this presumption, and, from the facts, they reached the conclusion that the driver, Lundgren was not the agent of the defendant.

This case does not end as in the other plaintiff contends, for the reason that there we have facts which clearly indicate that the defendant directed William Sullivan to use his car automobile for the purpose of testing the liability on the railroad crossing in Chicago, and in doing so William Sullivan, the driver, at the direction of defendant, conveyed the plaintiffs to the premis of the defendant, to the station in question and under the agent of the defendant.

One other question of vital importance exists, and that is: did this driver negligently operate the ford automobile at the

time of the accident? The evidence indicates that the driver was operating the car at a speed from 35 to 40 miles an hour, and the inference may be drawn from the evidence introduced by the plaintiffs, that when making the turn at the Harms Road they noticed a car approaching at a distance of 200 feet, travelling at a great rate of speed. The evidence does not seem to be clear as to whether this car was in the center or on the side of the road. It appears from the evidence that as the car reached plaintiffs' car, William Sullivan seemed to turn the wheel. The two cars came close together, and the oncoming car swerved off the road and the accident happened which caused the injuries to the plaintiffs.

The evidence does not tend to establish the charge made by the plaintiffs in their declaration that the driver of the car operated and controlled the car at the intersection so that the motor vehicle ran off the traveled portion of said highway into a certain ditch. It does not appear from the facts in this record that there is any evidence which would tend to establish that the driver carelessly operated and controlled the motor vehicle and by reason thereof the car ran off the traveled portion of the pavement.

Three other questions are raised, but there is no evidence, as we view the record, that the defendant's agent did not keep a proper and sufficient lookout so as to discover danger at the intersection, or that the car was unlawfully run at a high and dangerous rate of speed in violation of the motor vehicle law, or that the car was operated at a high and dangerous rate of speed at the time of the accident. On the contrary, from the statements signed by these plaintiffs it would seem that the oncoming automobile and the manner in which it was operated xxxxxxxxxxxx was the cause of this accident.

For the reasons stated, these cases are reversed and the causes remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

time of the accident? The evidence indicates that the driver was operating the car at a speed from 35 to 40 miles an hour, and the inference may be drawn from the evidence introduced by the plaintiffs, that when making the turn at the K-Ree Road they noticed a car approaching at a distance of 300 feet, travelling at a great rate of speed. The evidence does not seem to be clear as to whether this car was in the center or on the side of the road. It appears from the evidence that as the car reached plaintiffs' car, William Sullivan seemed to turn the wheel. The two cars came close together, and the oncoming car swerved off the road and the accident happened which caused the injuries to the plaintiffs.

The evidence does not tend to establish the charge made by the plaintiffs in their declaration that the driver of the car operated and controlled the car at the intersection so that the motor vehicle ran off the traveled portion of said highway into a certain ditch. It does not appear from the facts in this record that there is any evidence which would tend to establish that the driver carelessly operated and controlled the motor vehicle and by reason thereof the car ran off the traveled portion of the pavement.

Those other questions are raised, but there is no evidence, as we view the record, that the defendants's agent did not keep a proper and sufficient lookout so as to discover danger at the intersection, or that the car was unlawfully run at a high and dangerous rate of speed in violation of the motor vehicle law, or that the car was operated at a high and dangerous rate of speed at the time of the accident. On the contrary, from the statements claimed by these plaintiffs it would seem that the oncoming automobile and the manner in which it was operated xxxxxxxxxxxx was the cause of this accident.

For the reasons stated, these cases are reversed and the causes remanded for a new trial.

HALE, C.J. AND CHARLES E. SULLIVAN, J. DISSENT.

REVERSED AND REMANDED.

38115

IN THE MATTER OF THE ESTATE OF JAMES EWING, Deceased,	APPEAL FROM
JOHN EWING, Administrator of the Estate of JAMES EWING, Deceased, Appellant,	CIRCUIT COURT
v.	COOK COUNTY.
ELIZABETH G. JOHNSON, Appellee.	264 I.A. 644

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

John Ewing, Administrator of the Estate of James Ewing, deceased, appeals to this court from a judgment entered in the Circuit Court of Cook County on November 13, 1934. The judgment order entered by the court was heard upon an appeal from an order entered in the Probate Court of Cook County, based upon a petition for a citation by the Administrator against the respondent, Elizabeth G. Johnson, by which order the Probate Court found that certain bonds therein described amounting to $9,500, in possession of the respondent, were the property of James Ewing at the time of his death, and directed the respondent forthwith to deliver the same to the administrator of the estate. On appeal the cause having been heard in the Circuit Court of Cook County, an order was entered in that court finding for the respondent that the bonds described in the order were the sole and separate property of the respondent, and that the administrator of the estate did not have any right, title or interest in the bonds.

The facts as they appear in the record are substantially that James Ewing at the time of his death was 76 years of age; that he died intestate, and that the cause of his death was pneumonia. He left him surviving two sons and one daughter - John Ewing, the administrator of the estate, William Ewing and Elizabeth G. Johnson.

BRIEF

IN THE MATTER OF THE ESTATE OF
JAMES EWING, Deceased.

JOHN EWING, Administrator of the
Estate of James Ewing, Deceased,

Appellant,

v.

ELIZABETH G. JOHNSON,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

204 I.A. 644

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

John Ewing, administrator of the Estate of James Ewing, deceased, appeals to this court from a judgment entered in the Circuit Court of Cook County on November 13, 1934. The judgment order entered by the court was based upon an appeal from an order entered in the Probate Court of Cook County, based upon a petition for a citation by the administrator against the respondent, Elizabeth G. Johnson, by which order the Probate Court found that certain bonds therein described amounting to $9,500, in possession of the respondent, were the property of James Ewing at the time of his death, and directed the respondent forthwith to deliver the same to the administrator of the estate. On appeal the cause having been heard in the Circuit Court of Cook County, an order was entered in that court finding for the respondent that the bonds described in the order were the sole and separate property of the respondent, and that the administrator of the estate did not have any right, title or interest in the bonds.

The facts as they appear in the record are substantially that James Ewing at the time of his death was 75 years of age; that he died intestate, and that the cause of his death was pneumonia. He left his surviving two sons and one daughter - John Ewing, the administrator of the estate, William Ewing and Elizabeth G. Johnson.

The deceased lived with the daughter for eleven years prior to his death. While ill he was attended by Calvin E. Brown, as the attending physician, from April 33, 1933, until he died on May 18, 1933. The doctor visited his patient four times and after the first visit said to him: "You have got pneumonia, that is a serious illness. It is a matter of life and death * * *." He also said to his patient: "If you have got any affairs to adjust, do it now because we never know what will happen." At that time the deceased had a safety deposit box in the National Safe Deposit Company, to which he alone had access. On the 28th day of April, 1933, in the presence of the doctor and the respondent, the late James Ewing signed an order directing the National Safe Deposit Company to permit his daughter, Elizabeth G. Johnson to have access to his deposit box. The evidence indicates that at that time James Ewing's mental condition was good. Thereafter the respondent presented the order to the Deposit Company; was permitted access to the box, and removed the bonds in question. Upon arriving home she delivered the bonds to her father, which he returned to her, and as evidence of his desire to transfer these bonds, he said: "Here, Lizzie, I want you to have these bonds for your kindness to me while I have been with you."

When the daughter returned home from the Deposit Company and handed the bonds to her father, David Burger, was present. He testified, "that when she, Elizabeth Johnson, came in and handed her father the bonds, she said, "Here, Dad, are the bonds from the bank," and he took the package in his hands, opened it, and said: "Here, Lizzie, I want you to have these. If anything happens to me I want you to have these bonds for your kindness while I have been with you." The bonds were in a large paper envelope, 11 inches or 12 inches long, 3 or 4 inches wide and about 1 inch thick. From the record, this witness was not related

The deceased lived with the testator for eleven years prior to his death. While ill he was attended by Calvin A. Brown, an the attending physician, from April 27, 1923, until he died on May 12, 1923. The doctor visited his patient four times and after the first visit said to him: "You have got pneumonia, but is a serious illness. It is a matter of life and death ". " He also said to his patient: "If you have got any affairs to adjust, do it now because we never know what will happen." At that time the deceased had a safety deposit box in the National Safe Deposit Company, to which he alone had access. On the 26th day of April, 1923, in the presence of the doctor and the respondent, the late James Ewing signed an order directing the National Safe Deposit Company to permit his daughter, Elizabeth G. Johnson to have access to his deposit box. The evidence indicates that at that time James Ewing's mental condition was good. Thereafter the respondent presented the order to the Deposit Company; was permitted access to the box, and removed the bonds in question. Upon arriving home she delivered the bonds to her father, which he returned to her, and as evidence of his desire to transfer these bonds, he said: "Here, Lizzie, I want you to have these bonds for your kindness to me while I have been with you."

When the daughter returned home from the Deposit Company and handed the bonds to her father, David Burger, was present. He testified, that when she, Elizabeth Johnson, came in and handed her father the bonds, she said, "Here, Ed, are the bonds from the bank," and he took the package in his hands, opened it, and said: "Here, Lizzie, I want you to have these. If anything happens to me I want you to have these bonds for your kindness while I have been with you." The bonds were in a large manila envelope, 11 inches or 12 inches long, 9 or 10 inches wide and about 1 inch thick. Upon the record, said witness was not related

to any of the parties, nor interested in the estate.

The deceased prior to his death remained in his daughter's home and was attended by her until, upon the advice of the attending physician, he was removed to a hospital, where he died. Witnesse testified that the deceased and his sons were not on friendly terms, and that the deceased in his lifetime, in the presence of a witness, stated that James Ewing (deceased) lived with the respondent approximately ten years prior to his death; that he got along fine with Mrs. Johnson, but he and his sons were not on friendly terms.

The controversy is based largely upon the facts in evidence. From the record it appears that there was a waiver of the question of competency of some of the witnesses who were interested in the estate, and it would seem that the principal defense presented by the administrator was that Mrs. Johnson was willing to give her brothers a share in the bonds, but from the evidence it does not appear she was willing to relinquish the gift of the bonds from her father, except to avoid litigation.

By the facts presented upon the trial, a gift causa mortis was established. While such gifts are not favored in law, still when properly evidenced by the presentation of facts, they will be recognized by the court. The evidence justified the conclusion reached by the court that there was a delivery of the bonds by the father to the respondent and that he expressed his intention that she was to have the bonds because of her kind treatment of him, and to carry out that wish he delivered the bonds to her. It would seem from the record that while he was living with his daughter she was the only one who looked after his wants, and from the facts as detailed there was sufficient evidence that the father made this gift to his daughter.

For the reasons stated we are of the opinion that there was no error in entering the order appealed from.

The judgment order of the court below is affirmed.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR. JUDGMENT AFFIRMED.

to any of the parties, nor interested in the estate.

The deceased prior to his death resided in his daughter's home and was attended by her until, upon the advice of the attending physician, he was removed to a hospital, where he died. Witnesses testified that the deceased and his sons were not on friendly terms, and that the deceased in his lifetime, in the presence of a witness, stated that James Young (deceased) lived with the respondent approximately ten years prior to his death; that he got along fine with Mrs. Johnson, but he and his sons were not on friendly terms.

The controversy is based largely upon the facts in evidence. From the record it appears that there was a waiver of the question of competency of some of the witnesses who were interested in the estate, and it would seem that the principal defense presented by the administrator was that Mrs. Johnson was willing to give her brothers a share in the bonds, but from the evidence it does not appear she was willing to relinquish the gift of the bonds from her father, except to avoid litigation.

By the facts presented upon the trial, a gift causa mortis was established. While such gifts are not favored in law, still when properly evidenced by the presentation of facts, they will be recognized by the court. The evidence justified the conclusion reached by the court that there was a delivery of the bonds by the father to the respondent and that he expressed his intention that she was to have the bonds because of her kind treatment of him, and to carry out that wish he delivered the bonds to her. It would seem from the record that while he was living with his daughter she was the only one who looked after his estate, and from the facts as detailed there was sufficient evidence that the father made this gift to his daughter.

For the reasons stated we are of the opinion that there was no error in entering the order appealed from.

The judgment order of the court below is affirmed.

MR. C.J. AND MESSRS. JUSTICES VAN DYKE, DONGES, DUFFIELD AFFIRMED.

38163

In the Matter of the Estate of
THOMAS N. DELIGIANES-GEORGE STAMOS,

Claimant - Appellee,

v.

ANDREW N. DELIGIANES, as Executor of the Last Will and Testament of Thomas N. Deligianes, Deceased,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

284 I.A. 644

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The appeal in this court is from a judgment entered in the Circuit Court of Cook County for $5,908.35 upon a verdict of the jury for the claimant against the Estate of Thomas N. Deligianes, deceased. The cause was pending in the Circuit Court upon appeal to that court from the allowance of the amount of the claim in the Probate Court of Cook County to George Stamos, as claimant.

The claim was based upon a contract dated February 2, 1928, and entered into between Thomas N. Deligianes, now deceased, and George D. Stamos. The material part of the contract is, in part, as follows:

> "The first party (Thomas N. Deligianes) agrees to accept the services of the second party (George D. Stamos) and upon said services having been satisfactorily performed by September 1st, 1928, the first party covenants and agrees to issue, or to have issued to the second party a certificate for Five Thousand Dollars ($5,000.00) worth par value of his (the first party's) personal share holdings in the Narrownap Folding Machine Company, Trust Estate."
> The second party agrees and covenants that he will render the services aforementioned."

The facts in the litigation are that the deceased and Andreas Bourdes and George Bourdes, his brother, entered into a joint enterprise, a so-called common law trust known as the Narrownap Folding Machine Company. In February, 1923, the claimant was an employee of Thomas N. Deligianes, and worked on the machine models and machine improvements; also sold paper napkins for the enterprise.

2813X

In the matter of the estate of
THOMAS R. HAILIGANG-GEORGE STAMOS,

Claimant - Appellee,

v.

ANDREW R. HAILIGANG, as Executor of
the Last Will and Testament of Thomas
R. Haliginess, Deceased,

Defendant - Appellant.

Appeal from
Circuit Court
Cook County.

2844 I.A. 644

Mr. JUSTICE HEALY DELIVERED THE OPINION OF THE COURT.

The appeal in this court is from a judgment entered in the Circuit Court of Cook County for $8,808.38 upon a verdict of the jury for the claimant against the estate of Thomas R. Haliginess, deceased. The cause was pending in the Circuit Court upon appeal to that court from the allowance of the account of the claim in the Probate Court of Cook County by George Stamos, as claimant.

The claim was based upon a contract dated February 2, 1928, and entered into between Thomas R. Haliginess, the decedent, and George S. Stamos. The material part of the contract is, in part, as follows:

> "The first party (Thomas R. Haliginess) agrees to accept the services of the second party (George S. Stamos) and upon said services having been satisfactorily performed by September 1st, 1928, the first party covenants and agrees to issue, or to have issued to the second party a certificate for fifty thousand dollars ($50,000.00) worth per value of his (the first party's) interest same relating to the Harrsburg Rolling Machine Company, that is to:
>
> The second party agrees and covenants that he will render the service aforementioned."

The facts in the litigation are that the decedent and Andrew Haliginess and George Stamos, his brother, entered into a joint enterprise, a so-called common law trade known as the Harrsburg Rolling Machine Company. In February, 1927, the claimant was an employee of Thomas R. Haliginess, and worked on the machine models and machine improvements; also did some selling for the enterprise.

Prior to 1928, another joint enterprise, known as the National Paper Napkin Company, was entered into between Thomas N. Deligianes and Andreas A. Bourdes, as principal owners of practically all of the beneficial interest in this company. On February 3, 1928, Deligianes and the claimant Stamos entered into the contract for Stamos' services, the subject of this controversy.

Subsequently, on February 28, 1929, the National Paper Napkin Manufacturing Company was incorporated, and received as a part of the assets, all of the machines owned by the Narrownap Folding Machine Company, a joint enterprise of Deligianes and Bourdes, and all of the assets of the National Paper Napkin Company, also a common law enterprise of these same parties. The property was appraised at $134,970, and the amount in cash at $9,030, and this appraisal and the cash were used in payment of the capital stock of this corporation received by the subscribers.

The taking over of the assets by the National Paper Napkin Manufacturing Company, a corporation, of the joint enterprises of Deligianes and Bourdes, known as the Narrownap Folding Machine Company and the National Paper Napkin Company, was in effect, a dissolution of the enterprises in which Deligianes and Bourdes were engaged. After the organization of this corporation, Deligianes was unable to deliver to George D. Stamos $5,000 of the stock of the corporation.

The contract in question is between Deligianes and Stamos, and from the evidence it does not appear that the work of Stamos performed under the contract was unsatisfactory to Deligianes.

The contention is that the court erred in allowing the amount of the claim for $5,000, upon the ground that there was no evidence which would justify such allowance. From the record it does appear that the claimant failed to receive shares of stock of the corporation equivalent in value to the sum of $5,000; that

Prior to 1928, another joint enterprise, known as the National Paper Box Company, was entered into between Thomas H. Dalglinee and Andrew A. Sanders, as principal owners of practically all of the beneficial interest in this company. On February 2, 1928, Dalglinee and the plaintiff Stone entered into the contract for Stone's services, the subject of this controversy.

Subsequently, on February 28, 1929, the National Paper Kaplin Manufacturing Company was incorporated, and received as a part of the assets, all of the machines owned by the Harrowes Folding Machine Company, a joint enterprise of Dalglinee and Sanders, and all of the assets of the National Paper Kaplin Company, also a common law enterprise of these same parties. The property was appraised at $124,270, and the amount is said at $8,000, and this appraisal and the cash were used in payment of the capital stock of this corporation received by the subscribers.

The taking over of the assets by the National Paper Kaplin Manufacturing Company, a corporation, of the joint enterprises of Dalglinee and Sanders, known as the Harrowes Folding Machine Company and the National Paper Kaplin Company, was in effect, a dissolution of the enterprises in which Dalglinee and Sanders were engaged. After the organization of this corporation, Dalglinee was unable to deliver to George S. Stone $2,000 of the stock of the corporation.

The contract in question is between Dalglinee and Stone, and from the evidence it does not appear that the work of Stone performed under the contract was unsatisfactory to Dalglinee.

The contention is that the court erred in allowing the amount of the claim for $2,000, upon the ground that there was no evidence which could justify such allowance. From the record it does appear that the claimant failed to receive shares of stock of the corporation equivalent in value to the sum of $2,000; that

while the deceased, Deligianes, in his lifetime was unable to induce Bourdes to contribute half of the number of shares of the corporation for the benefit of the claimant, there is no evidence in the record showing why Deligianes did not carry out the provisions of the contract by his contribution of the number of shares of stock of this company sufficient to pay the claimant in full the $5,000 called for by the contract.

The estate by its executors contends that the claimant's contract was void for want of consideration, for the reason that Deligianes was president of the corporation, and was not authorized to enter into such contract. This contention is not borne out by the contract itself. The contract is to be construed from the language employed by the makers, and it is clear that it is a contract entered into by Deligianes and Stamos, and is not a contract with the corporation.

The defendant further claims that the court erred in refusing to direct the jury to find for the defendant. The defendant in this action offered no evidence upon the trial. This court is unable to agree with the theory of the defendant that the claimant failed to establish by the evidence that his services were satisfactory. On the contrary, the evidence offered by the claimant was that he rendered services, which appear to have been satisfactory to Deligianes, who entered into this contract.

In rendering the services required, the claimant was on the road and received $40.00 a week for expenses in the use of his automobile for traveling from 200 to 300 miles each day he was on the road. There is no evidence that tends in any way to question the services rendered by this claimant.

The amount found by the jury for the complainant is questioned by the estate. The contract itself is the best guide, where the claimant did not receive the amount provided for in the

while the decedent, Dolighanes, in his lifetime was unable to induce Mandra to contribute half of the number of shares of the corporation for the benefit of the claimant, there is no evidence in the record showing why Dolighanes did not carry out the provisions of the contract by his contribution of the number of shares of stock of this company sufficient to pay the claimant in full the $5,000 called for by the contract.

The estate by its executors contends that the claimant's contract was void for want of consideration, for the reason that Dolighanes was president of the corporation, but was not authorized to enter into such contract. This contention is not borne out by the contract itself. The contract is to be construed from the language employed by the writers, and it is clear that it is a contract entered into by Dolighanes and Ottmann, and is not a contract with the corporation.

The defendants further claim that the court erred in refusing to direct the jury to find for the defendant. The defendant in this action offered no evidence upon the trial. This court is unable to agree with the theory of the defendant that the claimant failed to establish by the evidence that his services were satisfactory. On the contrary, the evidence offered by the claimant was that he rendered services, which appear to have been satisfactory to Dolighanes, who entered into the contract.

In rendering the services required, the claimant ran on the road and received $40.00 a week for expenses in the use of his automobile for traveling from 300 to 400 miles each day he was on the road. There is no evidence that tends in any way to question the services rendered by this claimant.

The amount found by the jury for the complainant is questioned by the estate. The contract itself is the best guide, where the claimant did not receive the reward provided for in the

contract for the services rendered by him and accepted by Deligianes. The language of this contract is simple and is not ambiguous where it provides that the first party, Deligianes covenants and agrees to issue or to have issued to the second party, Stamos, a certificate for $5,000 worth of par value of his (the first party's) personal share holdings in the Narrownap Folding Machine Company. The words "Five Thousand Dollars worth" of the issue mean that the claimant is to receive $5,000 worth in value of stock from Deligianes, and having failed to receive the $5,000 worth of stock, the claimant was properly allowed that sum by the jury's verdict.

The defendant finally urges that the court erred in refusing to sustain a motion to exclude claimant's testimony. The record is silent as to any objections having been made by the defendant to the testimony of the claimant. However, the ground urged by the estate is that the testimony of the claimant was improper and irrelevant and should be excluded. The brief is not clear as to just what the defendant contends.

The claimant in testifying stated that there was no other contract involved, and that he seeks to recover only upon the terms of the contract in question.

As far as we have been able to determine from the briefs filed by the defendant, his sole defense seems to be that the proof was not sufficient to sustain the claimant's claim. We have examined the record and are satisfied that there is sufficient in the record to sustain the verdict of the jury and the judgment of the court. For that reason the amount of the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

contract for the purchase machinery on time and accepted by delivery. The language of this contract is simple and is not ambiguous where it provides in the first party, delivered overwhelmed the plaintiff in issue as to have issued to the second party, [illegible], a certificate for [illegible] worth of her value of his (the first party's) property above nothing in the [illegible] holding [illegible] company. [illegible] "worth" of the [illegible] the claimant is to receive [illegible] worth in value of stock from [illegible], and having [illegible] receive the [illegible] worth of stock, the contract was correctly closed [illegible] by the jury's verdict.

The defendant finally argues that the court erred in refusing to submit a motion to exclude [illegible] testimony. The record is silent as to any objections having been made by the defendant to the testimony of the witness. However, the [illegible] by the [illegible] in that the testimony, of the witness was [illegible] and irrelevant, not admissible as evidence. The trial is not [illegible] to just what the defendant [illegible].

The claimant [illegible] that there was no other contract involved, and [illegible] to take [illegible] only upon the terms of the contract [illegible].

A [illegible] has been made to determine [illegible] the burden filed by the defendant. [illegible] that the [illegible] was [illegible] the plaintiff's claim. [illegible] [illegible] is [illegible] the [illegible] to [illegible] the judgment of the court. [illegible] the [illegible] of the [illegible] in [illegible].

[illegible]

[illegible]

38191

HENRY H. CROSS COMPANY, a corporation, (Plaintiff) Appellant, v. ARKANSAS NATURAL GAS CORPORATION, (Defendant) Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

284 I.A. 644

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in favor of the defendant in an action in assumpsit for damages sustained by reason of the breach by the defendant of its contract to sell and deliver to the plaintiff all the casinghead gasoline manufactured and produced at the defendant's Louann, Arkansas, plant during the year 1931. The parties waived a jury and the court heard the evidence and entered judgment for the defendant.

The plaintiff seeks to recover money damages from the defendant, claiming that the defendant breached its contract to sell and deliver to the plaintiff all the casinghead gasoline produced and manufactured during the year 1931 at defendant's Louann, Arkansas, plant, when the defendant on August 4, 1931, voluntarily closed its Louann, Arkansas, plant and terminated the contract. Plaintiff contends that under the terms of its contract defendant was obliged to keep its plant open to manufacture casinghead gasoline and to sell it to plaintiff during the entire year 1931 unless prevented by strikes, fires, accidents, or other causes beyond the control of either of the parties; that after the defendant terminated its contract, plaintiff to meet its requirements, was obliged to buy similar casinghead gasoline upon the market at a higher price or delivered cost, and that the defendant should respond in damages.

To this contention of the plaintiff, the defendant replies in these words:

58191

HENRY H. CHUNG COMPANY, a corporation, (Plaintiff) Appellant, v. ARKANSAS NATURAL GAS CORPORATION, (Defendant) Appellee.	Appeal from Pulaski Chancery Court. Hon. Mahlon Reed.

234 I.A. 644

Mr. JUSTICE HUGH McULLOCH THE CHIEF JUSTICE, in the court.

This is an appeal by the plaintiff from a judgment entered in favor of the defendant in an action in assumpsit for damages sustained by reason of the breach by the defendant of its contract to sell and deliver to the plaintiff all the casinghead gasoline manufactured and produced at the defendant's Lonsdale, Arkansas, plant during the year 1921. The portion which a jury and the court heard the evidence and entered judgment for the defendant.

The plaintiff sues to recover money damages from the defendant, claiming that the defendant breached its contract to sell and deliver to the plaintiff all the casinghead gasoline produced and manufactured during the year 1921 at defendant's Lonsdale, Arkansas, plant, when the defendant on August 4, 1921, voluntarily closed its Lonsdale, Arkansas, plant and terminated the contract. Plaintiff contends that under the terms of the contract defendant was obliged to keep its plant open to manufacture casinghead gasoline and to sell it to plaintiff during the entire year 1921 unless prevented by strikes, fires, accidents, or other causes beyond the control of either of the parties; that after the defendant terminated its contract, plaintiff to meet its requirements, was obliged to buy similar casinghead gasoline from the plants at a higher price or delivered cost, and that the defendant should pay the difference in damages.

To this contention of the plaintiff, the defendant replies that there was

"The plaintiff seeks to recover damages, not for defendant's failure to deliver all the casinghead gasoline manufactured and produced at its Louann plant during 1931, but rather for defendant's failure to operate its plant and produce casinghead gasoline after August 8, 1931, 'which failure and refusal of defendant to perform * * * was not in good faith or in any way caused or due to strikes, fires, accidents or other causes beyond the control of either of the parties.'"

The contract, which is the subject of the litigation, is as follows:

"No. 4355-P

Chicago, January 29, 1931

Arkansas Natural Gas Co.,
El Dorado, Arkansas.

Ship to: Henry H. Cross Co.,
Smackover, Ark.
Via Mo. Pac from Louann, Ark. Plant.

All of the casinghead gasoline, some 25 to 35 cars per month, which may be produced or manufactured at the Louann, Ark. plant of the Arkansas Natural Gas Corporation during the year 1931.

Price: paid to be 1/2¢ per gallon above the average price posted by Platt's Oilgram for same grade of gasoline, for Group 3, on date of each shipment.

It is understood that this purchase is subject to strikes, fires, accidents, or other causes beyond control of either party.

Terms, 1% - 10 days.

Henry H. Cross Company
Per: Geo. F. Fox
V. P.

Note: All invoices must bear our order number
Remarks:
Accepted: February 5, 1931
Arkansas Natural Gas Corporation
By (Signature Illegible)
Vice President".

This contract was effective for the entire year 1931 and was accepted by the defendant on February 5, 1931. "Platt's Oilgram" referred to in the contract is a bulletin published practically daily with editions issued in Chicago. Cleveland, New York and Tulsa. It shows the general selling prices and price changes of all petroleum commodities in tank car lots f. o. b. all refining centers. The term "Group 3" refers to the refining center which includes

"The plaintiff seeks to recover damages, not for defendant's failure to deliver all the cracking gasoline manufactured and produced at the Lenora plant during 1921, but rather for defendant's failure to operate the plant and produce cracking gasoline after August 8, 1921, 'which failure and refusal of defendant to perform * * * was not in good faith or in any way caused or due to strikes, fires, accidents or other causes beyond the control of either of the parties.'"

The contract, which is the subject of the litigation, is as follows:

"No. A585-P

Chicago, January 28, 1921

Arkansas Natural Gas Co.,
El Dorado, Arkansas.

Ship to: Henry H. Cross Co.,
Anacover, Ark.
Via Mo. Pac Cross Roads, Ark. Plant.

All of the cracking gasoline, some 28 to 35 cars per month, which may be produced by manufacture at the Lenora, Ark. plant of the Arkansas Natural Gas Corporation during the year 1921.

Price: Paid to be 1/8¢ per gallon above the average price posted by Platt's Oilgram for same grade of gasoline, for month 3, on date of each shipment.

It is understood that this contract is subject to strikes, fires, accidents, or other causes beyond control of either party.

Terms, 15 - 10 days.

Henry H. Cross Company
Per: Geo. A. Fox
V. P.

Note: All invoices must bear our order number
Accepted: January 8, 1921
Arkansas Natural Gas Corporation
By (Signature illegible)
Vice President".

This contract was effective for the calendar year 1921 and was accepted by the defendant on February 8, 1921. "Platt's Oilgram" referred to in the contract is a bulletin published regularly daily with editions issued in Chicago, Cleveland, New York and Tulsa. It shows the general selling prices and price changes of all petroleum commodities in tank car lots f. o. b. all refining centers. The term "Group 3" refers to the refining center which includes

Oklahoma, Kansas and Arkansas. The prices ofoil and gasoline vary in the different groups, depending upon the quality of oil produced and the freight rate.

Plaintiff was engaged in the business of buying, selling, refining and blending gasoline and oils. It has operated a refinery at Smackover, Arkansas, since 1923. The defendant in 1921 purchased a plant at Louann, Arkansas, which was five or six miles distant from Smackover, Arkansas, and thereafter operated the plant in manufacturing casinghead gasoline. This plant was enlarged in 1926 and its capacity increased, so that it was capable of producing a maximum gallonage of about 16,000 gallons of casinghead gasoline daily. The plaintiff and the defendant had established businesses at the time the contract was made.

Between January 1, 1931, and August 3, 1931, the defendant, in accordance with the terms of the agreement, manufactured at its Louann plant and shipped to plaintiff at Smackover 196 cars of casinghead gasoline. Each car contained approximately 8,000 gallons of casinghead gasoline and the cars were delivered on an average of twenty-seven and one-half cars per month.

On July 17, 1931, defendant notified plaintiff by letter that the defendant intended to shut down its Louann plant. Defendant's plant was actually closed on August 4, 1931, and thereafter during the year 1931 it failed to produce or sell to plaintiff any casinghead gasoline. This cessation of operations it was claimed was not caused by strikes, fires or accidents at defendant's plant or other causes beyond the control of the parties.

It was stipulated by the parties in the instant case that between August 4, 1931, and December 31, 1931, the plaintiff,to fill its requirements, purchased at current market prices upon the open market and from the Henderson Co., Columbian Gasoline Corporation,

Chlorox, Lemon and Ammonia. The prices of oil and gasoline vary in the different regions, depending upon the quality of oil produced and the freight rate.

Plaintiff was engaged in the business of buying, selling, refining and blending gasoline and oils. It has operated a refinery at Lockeport, Kansas, since 1922. The defendant in 1921 purchased a plant at London, Kansas, which was five or six miles distant from Lockeport, Kansas, and thereafter operated the plant in manufacturing casinghead gasoline. This plant was enlarged in 1922 and its capacity increased, so that it was capable of producing a maximum gallonage of about 18,000 gallons of casinghead gasoline daily. The plaintiff and the defendant had established businesses at the time the contract was made.

Between January 1, 1921, and August 1, 1921, the defendant, in accordance with the terms of the agreement, manufactured at its London plant and delivered to plaintiff at Lockeport 100 cars of casinghead gasoline. Each car contained approximately 6,000 gallons of casinghead gasoline and the cars were delivered on an average of twenty-seven and one-half cars per month.

On July 17, 1921, defendant notified plaintiff by letter that the defendant intended to shut down its London plant. Defendant's plant was actually closed on August 1, 1921, and thereafter during the year 1921 it failed to produce or sell to plaintiff any casinghead gasoline. This cessation of production it was claimed was not caused by strikes, fires or accidents to defendant's plant or other causes beyond the control of the parties.

It was estimated by the parties in the contract that between August 1, 1921, and December 31, 1921, the plaintiff's full requirements, amounted at current market prices upon the open market and from the American Co., Cumberland Gasoline Corporation,

Rainbow Gasoline Corporation, Lion Oil Refining Company and Magnolia Petroleum Company the 131 cars of casinghead gasoline at a price of $3,474.79 in excess of the price plaintiff would have been required to pay under its contract with the defendant.

Casinghead gasoline is manufactured from the "wet" gas which is obtained while crude oil is pumped from the wells. This "wet" gas is drawn in through pipe lines from the wells to a central plant where the gas is passed through an absorption oil which absorbs the gasoline particles. The oil is then saturated with gasoline and when heated the casinghead gas is driven off and condensed and runs into accumulators as gasoline.

Does the contract in question require defendant to continue the operation of its Louann plant and deliver casinghead gasoline during the entire year of 1931? In order to determine this question it is necessary to depend largely upon the construction of the contract between the parties. The language of the contract is that used by the plaintiff and is, in part:

> "All of the casinghead gasoline * * *, which may be produced or manufactured at the Louann, Ark. plant * * * during the year 1931."

The defendant contends that upon this phase of the contract there is nothing in the language quoted that required the defendant to do anything other than to ship all casinghead gasoline which may be produced or manufactured at the plant. It is well to have in mind that in the case of Northwestern Traveling Men's Assn. v. Crawford, 126 Ill App. 468, this court said the use of the word "may" does not mean "shall" and it is not so construed in private contracts. It is only in the case of statutes by which public rights are involved that this construction is sometimes adopted *ex debito justitiae*. With this construction contended for by the defendant, the plaintiff agrees, but endeavors to mitigate the force of this construction by relying upon Funk & Wagnalls' New Standard Dictionary, 1919 Edition,

Rainbow Gasoline Corporation, Blue Oil Refining Company and Imperial Petroleum Company the 1931 crop of casinghead gasoline at a price of $3,476.75 in excess of the price plaintiff would have been required to pay under its contract with the defendant.

Casinghead gasoline is manufactured from the "wet" gas which is obtained while crude oil is pumped from the wells. This "wet" gas is drawn in through pipe lines from the wells to a central plant where the gas is passed through an absorption oil which absorbs the gasoline particles. The oil is then saturated with gasoline and then be led the casinghead gas is driven off and condensed and runs into accumulators as gasoline.

Does the contract in question require defendant to continue the operation of its Lawson plant and deliver casinghead gasoline during the entire year of 1931? In order to determine this question it is necessary to depend largely upon the construction of the contract between the parties. The language of the contract is that used by the plaintiff and is, in part:

> "All of the casinghead gasoline * * *, which may be produced or manufactured at the Lawson, Okla. plant * * * during the year 1931."

The defendant contends that upon this phase of the contract there is nothing in the language quoted at it required the defendant to do anything other than to sell all casinghead gasoline which may be produced or manufactured at the plant. It is well to bear in mind that in the case of Northwestern Terminal Co. v. Crawford, 150 Ill App. 466, this court said the use of the word "may" does not mean "shall" and it is not to be construed in duty to be compelled. It is only in the case of statutes by which public rights are involved that this construction is sometimes adopted as dubito mutilius. With this construction contended for by the defendant, the plaintiff agrees, but endeavors to mitigate the force of this construction by relying upon Funk & Wagnalls' New Standard Dictionary, 1931 edition,

definition that "may", in the sense it is used in the contract, means "all of the casinghead gasoline * * * which is contingently possible of being produced or manufactured." This court cannot agree with the plaintiff' interpretation, for such construction would result in a contract that all casinghead gasoline was to be delivered during the year 1931. The contract itself does not require the plaintiff to take or the defendant to deliver all of the casinghead gasoline produced by the defendant for the time limit, but the plaintiff is only required to take from 25 to 35 cars per month during the period limited by the contract. This construction is aided by the admission of the plaintiff that the words "some 25 to 35 cars per month", do not amount to an absolute warranty by the defendant to deliver a definite amount. The use of the word "may" by the parties, when speaking of production, is in a promissory sense. In other words, the plaintiff would take all casinghead gasoline not to exceed 25 to 35 cars a month that may be produced, and such construction is justified from the fact that the defendant by the terms of the contract does not guarantee to deliver casinghead gasoline. From the admission by the plaintiff that the contract does not guarantee delivery of a definite amount, it follows that the plaintiff is not in a position to recover for the difference in price between that provided for in the contract and the price paid in the open market during the period for which recovery is sought. The language used is, as we have indicated before, the language of the plaintiff in the preparation of the contract, and applying the rule that the contract is to be construed most strongly against the one who draws the instrument, we cannot assume from the construction applied by us that the defendant guaranteed the amount of casinghead gasoline it would deliver, and this being so, we believe the court did not err in refusing to enter a judgment for the quantity to be delivered for each of the months in which the plaintiff

definition that "may", in the sense it is used in the contract, means "all of the casinghead gasoline " " which is contingently possible of being produced or manufactured." This court cannot agree with the plaintiff's interpretation, for such construction would result in a contract that all casinghead gasoline was to be delivered during the year 1921. The contract itself does not require the plaintiff to take or the defendant to deliver all of the casinghead gasoline produced by the defendant for the time limit, but the plaintiff is only required to take from 25 to 35 cars per month during the period limited by the contract. This construction is aided by the admission of the plaintiff that the words "some 25 to 35 cars per month", do not amount to an absolute warranty by the defendant to deliver a definite amount. The use of the word "may" by the parties, when speaking of production, is in a permissory sense. In other words, the plaintiff would take all casinghead gasoline not to exceed 25 to 35 cars a month that may be produced, and such construction is justified from the fact that the defendant by the terms of the contract does not guarantee to deliver casinghead gasoline. From the admission by the plaintiff that the contract does not guarantee delivery of a definite amount, it follows that the plaintiff is not in a position to recover for the difference in price between that provided for in the contract and the price paid in the open market during the period for which recovery is sought. The language used in, as we have indicated below, the language of the plaintiff in the preparation of the contract, and applying the rule that the contract is to be construed most strongly against the one who draws the instrument, we cannot assume from the construction applied by us that the defendant guaranteed the amount of casinghead gasoline it would deliver, and this being so, we believe the court did not err in refusing to enter a judgment for the quantity to be delivered for each of the months in which the plaintiff

contends defendant failed to operate and deliver. We have stated, there being no guaranteed obligation to deliver the quantities fixed in the contract, then of course the plaintiff could not rely on the provision in the contract for monthly deliveries as a basis for recovery.

The plaintiff, however, contends that the court will imply that there is a warranty that the defendant will continue its plant for the purposes of producing a commodity necessary to meet the plaintiff's demands and established needs. Such an implied warranty would be in effect adding a further condition to the written contract. There is nothing in the contract requiring the defendant to run its plant in any particular way, nor are there any words which would indicate that the defendant was prohibited from closing its plant whenever it might find it desirable or necessary to do so. Upon this question the rule is well stated in the case of Burt v. Garden City Sand Co., 141 Ill. App. 603, as follows:

> "Where parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by implication; the presumption is, that having expressed some, they have expressed all the conditions by which they intend to be bound under the instrument. It is possible that each party to the instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentially, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligation by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

The opinion of the Appellate Court was affirmed by the Supreme Court in Vol. 237 Ill. 473. The court there said in part:

> "It is urged, however, by the appellant, that it appears from the contract and extraneous facts and circumstances

> in evidence that the parties intended that the plant should be operated to its full capacity, and that the appellant should receive during the year what cement could reasonably be produced by the plant when run at its full capacity. The contract does not so state, and the court cannot import into the contract a provision which the parties have omitted therefrom."

In another decision, in the case of Pfann v. Turner Cypress Lumber Co. , 194 Fed. Rep. 69, the court said, at p. 71:

> "The decisive and only question, which we shall consider, arises upon the face of the contract and its extension as agreed upon by the parties. * * * It is contended by the lumber company that the words employed required Pfann & Co. to operate their plant for the period of two years, and upon their failure to do so a cause of action accured to it for breach of contract. On the other hand, Pfann & Co. insist that they did not contract away their right to sell the plant and that they were obligated to deliver such lumber only as might be manufactured by them while the mill was in operation.
>
> We think that the latter construction is the proper one to place upon the contract. The words do not import a promise to keep the mill in operation, nor to manufacture any quantity of lumber during the two years."

See also Ramey Lum. Co. v. Schroeder Lumb. Co. 237 Fed. 39 (C. C. A. 7th Cir.); Semple, et al. v. Stewart et al. 22 Barb. N. Y. 154.

There is evidence in the record that the supply of casinghead gasoline was in a decline, for the reason that the product in question is controlled by the supply of "wet" gas from the field in question, and there was a decrease in the volume of "wet" gas available. In closing down its plant the defendant acted in good faith, and as evidence of such good faith there is a letter in the record, written by the defendant on July 17, 1931, and sent to the plaintiff. The letter is, in part, as follows:

> " * * * we have no alternative but to shut down our * * * plant * * * for causes beyond our control. There has been a sharp decline in both production and price of crude oil * * * causing a number of operators to abandon their leases. This abandonment of leases and the decline of casinghead gas production, over which we have no control, have, with the existing low prices of natural gasoline forced us to operate at considerable loss for some time. However, even though there should be an adjustment in the price of natural gasoline, we could not continue to operate on the decreased volume of casinghead gas."

> in evidence that the parties intended that the plant should be operated to its full capacity, and that the appellant should receive during the year when season could reasonably be produced by the plant when run at its full capacity. The contract does not so state, and the court cannot insert into the contract a provision which the parties have omitted therefrom."

In another decision, in the case of Clunn v. Lumber Products Co., 1st Fed. Rep. 68, the court held, at p. 71:

> "The decisive and only question, which we shall consider, arises upon the face of the contract and its execution as agreed upon by the parties. * * * It is conceded by the lumber company in t the works employed remained idle 6 Co. to operate their plant for the period of two years, and upon their failure to do so a cause of action accrued to it for breach of contract. On the other hand, Clunn & Co. insist that they did not contract any their right to sell the lumber and that they were obliged to deliver such lumber only as might be manufactured by them while the mill was in operation.
>
> We think that the latter construction is the proper one to place upon the contract. The words in not imply a promise to keep the mill in operation, nor to manufacture any quantity of lumber during the two years."

See also Kenny Law, op. v. Shoemaker Bank, op. 117 Ind. 58 (C. C. A. 7th Cir.); Kenny, et al. v. Clement et al. 3 Ind. App. 1, 1891.

There is evidence in the record in the supply of casing-head gasoline was in a loading, for the reason that the conduct in question in continuing by the supply of "wet" gas from the field in question, and there was a decrease in the volume of "wet" gas available. In closing upon its right the defendant stated in open court, and as evidence of such good faith, there is a letter on the record, written by the defendant on July 17, 1921, and sent to the plaintiff. The letter is, in part, as follows:

> " * * we have no alternative but to shut down our plant * * * " The owners concerned are tenants. There are been * short notice in both production and price of casing oil * * * causing a number of gas wells to shutdown their leases. This curtailment of leases has the effect of decreasing our gas production, over which we have no control. We, with the existing low price of natural gasoline forced us to operate at considerable loss for some time. However, even though there should be an adjustment in the price of natural gasoline, we could not continue to run on the reduced volume of casing head gas."

For the reasons stated in our opinion, it follows that we must affirm the judgment entered by the trial court. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

For the reasons stated in our opinion, it follows that we must affirm the judgment entered by the trial court. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DAVIS E. SMALLWOOD, J. CONCUR.

38247

KASPER GAVENIS,

Appellee,

v.

THE JOHN HANCOCK LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

284 I.A. 644

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Plaintiff's action is on two insurance policies issued by the defendant company to Joseph Rauka, now deceased, and made payable upon his death to the plaintiff as beneficiary. A trial was had before the court and a jury and a verdict was rendered in favor of the plaintiff and against the defendant for $760. Upon this verdict of the jury a judgment for the amount was entered by the court, and from this judgment the defendant appeals.

Plaintiff's statement of claim alleged that the defendant company issued two life insurance policies upon the life of Joseph Rauka, one in the sum of $360, and the other in the sum of $400. The first policy was dated June 15, 1932, and the other, July 13, 1932. Joseph Rauka died while the policies were still in full force. The plaintiff as beneficiary filed the necessary proof of loss, but the defendant failed to pay the amount due under the terms of its policies.

To this statement the defendant filed its affidavit of merits, in which it states, in brief, that in the applications for the policies Joseph Rauka represented that he was on said dates of the applications in sound health; that he had never had any sickness or received treatment in any hospital; that the said answers were false and untrue and were known by Joseph Rauka to be false and untrue, as he had been treated by a physician and had been an

SUFFOLK, ss.

SADIE DAVIDIS,

Appellee,

v.

THE JOHN HANCOCK LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,

Appellant.

SUPREME JUDICIAL COURT

WHOLESOME COURT

SUFFOLK.

284 I.A. 644

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff's action is on two insurance policies issued by the defendant company to Joseph Davis, who deceased, and made payable upon his death to the plaintiff as beneficiary. A trial was had before the court and a jury and a verdict was rendered in favor of the plaintiff and against the defendant for $[illegible]. Upon this verdict of the jury a judgment for the amount was entered by the court, and from this judgment the defendant appeals.

Plaintiff's cause of action alleged that the defendant company issued two life insurance policies upon the life of Joseph Davis, one in the sum of $[illegible], and the other in the sum of $[illegible]. The first policy was dated June 1, 1922, and the other, July 1, 1923. Jewish Tribe that with the policies were still in full force. The plaintiff as beneficiary filed the necessary proof of loss, but the defendant failed to pay the amount due under the terms of its policies.

In this discussion the defendant files its affidavit of merits, in which it states, in brief, that in the negotiations for the policies Joseph Davis represented that he was in well-[illegible] of the applications in sound health; that he had never had any sickness or received treatment in any hospital; that the risk assumed were false and untrue and were known by Joseph Davis to be false and untrue, as he had been treated by a physician and had been on

inmate of and received treatment at the Cook County Hospital in March 1932, for rheumatic endocarditis with nephritis prior to the dates of the applications for insurance.

To this affidavit of merits the plaintiff filed a reply, in which he alleges that Joseph Rauka stated that he had within two years prior to the application been ill and received medical attention in a hospital, and that he had been attended by a physician for heart disease prior to the dates of the applications. Plaintiff further alleges that all answers made by Rauka to the questions asked were truly and correctly answered, and that the defendant company waived the defense set forth and is estopped from asserting this defense.

To this reply the defendant filed an answer, in which it is stated that the defendant's agent did not have knowledge that Joseph Rauka was an inmate of a hospital, nor that he was attended by a physician.

Upon the issues, the court submitted the case to the jury, and this being a fourth class action, the pleadings are not controlling, but the rights of the parties are dependent upon the evidence adduced at the trial.

From the facts it appears that Joseph Rauka entered the County Hospital as a patient on March 12, 1932, and that at that time he had swelling of the ankles, called edema. He had a heart ailment and shortness of breath, and was treated for these diseases, and also for chronic bronchitis and was discharged from the hospital on March 29, 1932. At the time he was discharged he signed a release in which he released the Cook County Hospital and its staff from all responsibility, for the reason that he left the hospital of his own free will and against the doctors' advice.

Joseph Rauka, the assured, applied for insurance, and received a policy in the sum of $360 on May 4, 1932. He also applied

inmate of and received treatment at the Cook County Hospital in March 1932, for rheumatic endocarditis with mephritis prior to the dates of the applications for insurance.

To this affidavit of merits the plaintiff filed a reply, in which he alleges that deceased Jones at had then be had within two years prior to the application been ill and received medical attention in a hospital, and that he had been attended by a physician for heart disease prior to the dates of the applications. Plaintiff further alleges that all answers made by Jones to the questions which were truly and correctly answered, and that the defendant company waived the defense set forth and is estopped from asserting this defense.

To this reply the defendant filed an answer, in which it is stated that the defendant's agent did not have knowledge that Joseph Jones was an inmate of a hospital, nor that he was attended by a physician.

Upon the issues, the court submitted the case to the jury, and this being a jury trial alone notice, the pleadings are not controlling, but the rights of the parties are determined upon the evidence adduced at the trial.

From the facts it appears that Joseph Jones entered the County Hospital as a patient on March 1, 1932, at that time he had swelling of the ankles, enlarged edema. He had a heart ailment and shortness of breath, and was treated for these diseases, and also for chronic bronchitis and was discharged from the hospital on March 25, 1932. At the time he was discharged he signed a release in which he released the Cook County Hospital and its staff from all responsibility, for the reason that he left the hospital of his own free will and against the doctors' advice.

Joseph Jones, the assured, applied for insurance, and received a policy in the sum of $500 on May 4, 1932. He also applied

for a policy on July 1, 1932, in the sum of $400, and the beneficiary named in both of the policies is the plaintiff in the action here on appeal.

When the assured signed the applications for insurance he stated he was in sound health and free from physical defects. He also answered question 18, which is: "Have you had within five years any sickness, injury or surgical operation or have you received treatment in any hospital, sanitarium or other institution?" "No."

The policies contained a provision that the policy was not to take effect unless upon the date thereof the insured was alive and in sound health; also a provision that the policy should be void if the insured had attended any hospital or institution of any kind engaged in the care of cure of human health or disease, or had been attended by a physician within two years for any serious disease, complaint or operation.

The material question before us in this particular case is whether Joseph Rauka in his lifetime falsely represented that he had not within five years of the date of the application for insurance, any sickness, injury or surgical operation, or had not been treated in any hospital.

From the evidence offered by the plaintiff, it appears that the insurance solicitor, when preparing the applications and inserting the answers for Rauka, who was unable to read or write, put the above question to the insured, which we regard as being very important, and he stated to the agent that he had been treated by a physician and had been in the Cook County Hospital as a patient on March 12, 1932, and that at that time the agent said in the presence, not alone of the applicant for the insurance, but also in the presence of the beneficiary who seeks to recover on these policies, that Rauka was not to say anything about his hospital

for a policy on July 1, 1922, in the sum of $4000, and the beneficiary named in both of the policies is the plaintiff in the action here on appeal.

When the assured signed the applications for insurance he stated he was in sound health and free from physical defects. He also answered question 18, which is: "Have you had within five years any sickness, injury or surgical operation or have you received treatment in any hospital, sanitarium or other institution?" "No."

The policies contained a provision that the policy was not to take effect unless upon the date thereof the insured was alive and in sound health; also a provision that the policy should be void if the insured had attended any hospital or institution of any kind engaged in the care or cure of human health or disease, or had been attended by a physician within two years for any serious disease, complaint or operation.

The material question before us in this particular case is whether Joseph Cooke in his lifetime falsely represented that he had not within five years of the date of the application for insurance, any sickness, injury or surgical operation, or had not been treated in any hospital.

From the evidence offered by the plaintiff, it appears that the insurance solicitor, when preparing the applications and inserting the answers for Cooke, who was unable to read or write, put the above question to the insured, which he regard as being very important, and he stated to the agent that he had been treated by a physician and had been in the Cook County Hospital as a patient on March 12, 1920, and that at that time the agent said in the presence, not alone of the applicant for the insurance, but also in the presence of the beneficiary who seeks to recover on these policies, that Cooke was not to say anything about his hospital

treatment and medical services rendered by a physician and "everything would be all right."

The plaintiff in this case is a half brother of the deceased.

A claim was filed by the plaintiff in which he certified that Mauka had not been attended by physicians during the preceding two years, and also that Mauka had never been an inmate of a hospital. The claim was signed by the plaintiff under oath, and assuming that the facts as stated by the plaintiff's witnesses are true, then there is but one conclusion to be reached from this evidence, and that is, that the applicant for insurance, presented an application which was not true, and this the plaintiff knew at the time the application was prepared by the agent of the insurance company.

From the facts as they appear in this record, the court is inclined to the view that these representations were made, and that when the insurance agent advised that nothing be said about them, this was done for the purpose of misleading and imposing upon the insurance company.

This court in Chvatal v. Metropolitan Life Insurance Co. 250 Ill. App. 642, a case which has some bearing upon the facts as we have them before us in the instant case, said:

> "The trial judge was evidently of the opinion that the company had been deceived, but apparently based his conclusion that defendant was liable on the proposition that the deception of defendant was by its agent and therefore the company was bound. If it is true that both the insured and the plaintiff and the agent of the company and the medical examiner knew that the applicant was in poor health and knew of her prior confinement in an insane asylum, and, having such knowledge inserted false statements in the application, they were all guilty of collusion to defraud the company, and under such circumstances their knowledge cannot be imputed to the company and the company is not bound by it. This is based upon the presumption that an agent engaged in defrauding his principal will not communicate knowledge of the fraud to his principal, and the presumption that a company has knowledge of facts which are within the knowledge of its agent does not protect the wrong-doer who was a party to the fraud. There are a number of cases supporting this proposition, among which are Mutual Life Ins. Co. v. Hilton-

treatment and medical services rendered by a physician and "everything would be all right."

The plaintiff in this case is a half brother of the deceased.

A claim was filed by the plaintiff in which he certified that Smith had not been attended by physicians during the preceding two years, and also that Smith had never been an inmate of a hospital. The claim was signed by the plaintiff under oath, and assuming that the facts as stated by the plaintiff's witnesses are true, then there is but one conclusion to be reached from this evidence, and that is, that the applicant for insurance, presented an application which was not true, and also the plaintiff knew at the time the application was prepared by the agent of the insurance company.

From the facts as they appear in this record, the court is inclined to the view that these representations were made, and that when the insurance agent advised that nothing be said about them, this was done for the purpose of misleading and imposing upon the insurance company.

This court in Gerstal v. Metropolitan Life Insurance Co. 320 Ill. App. 623, a case which has some bearing upon the facts as we have them before us in the instant case, said:

> "The trial judge was evidently of the opinion that the company had been deceived, but apparently based his conclusion that the defendant was liable on the proposition that the deception of defendant was by the agent and therefore the company was bound. It is true that both the insured and the plaintiff and the agent of the company and the medical examiner knew that the applicant was in poor health and knew or had rather conclusive in an insane asylum, and having such knowledge inserted false statements in the application, they were all guilty of collusion to defraud the company, and under such circumstances their knowledge cannot be imputed to the company and the company is not bound by it. This is based upon the proposition that as agent engaged in defrauding his principal will not be presumed knowledge of the fraud to his principal, and the presumption that a company has knowledge of facts which are within the knowledge of its agent does not protect the wrong-doer who was a party to the fraud. There are a number of cases supporting this proposition, among which are Mutual Life Ins. Co. v. Hilton-

> Green, 241 U. S. 613; McCormack v. Security Mutual Life Ins. Co. 320 N. Y. 447; Carlson v. Metropolitan Life Ins. Co. 221 Ill. App. 354; Franklin v. Metropolitan Life Ins. Co. 226 Ill. App. 645; Rockford Ins. Co. v. Nelson, 65 Ill. 415. In this last case the court said that to hold otherwise 'would put these organizations completely at the mercy of dishonest and unscrupulous agents.'"

The opinion of the court is conclusive. To say that the applicant after stating that he was in a hospital, was advised by the solicitor for the defendant company to say nothing about it and everything would be all right, would indicate that the insured, as well as the plaintiff beneficiary, who was present, consented to the insertion of the untruthful answer. There is nothing in this record from which we can arrive at the conclusion that the defendant waived its rights under the terms of the contract between the parties.

It is unfortunate that the solicitor for the insurance company was not produced as a witness, although there is evidence that he was not connected with the insurance company at the time of the trial, and that it was not known where he could be found.

From the facts as they appear in the record, it is necessary that the case be retried. Accordingly, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

Green, 161 U. S. 293; Hogemann v. Security Mutual Life Ins. Co. 240 N. Y. 407; Sartison v. Metropolitan Life Ins. Co. 241 Ill. App. 164; Langella v. Metropolitan Life Ins. Co. 252 Ill. App. 458; Hopkins Ins. Co. v. Nelson, 68 Ill. 418. In this last case the court said that it could otherwise "hold out these organizations completely at the mercy of dishonest and unscrupulous agents."

The opinion of the court is conclusive. To say that the applicant after stating that he was in a hospital, was misled by the solicitor for the defendant company to say nothing about it and everything would be all right, would indicate that the insured, as well as the plaintiff beneficiary, who was present, consented to the insertion of the untruthful answer. There is nothing in this record from which we can arrive at the conclusion that the defendant waived its rights under the terms of the contract between the parties.

It is unfortunate that the solicitor for the insurance company was not produced as a witness, although there is evidence that he was not connected with the insurance company at the time of the trial, and that it was not known where he could be found.

From the facts as they appear in the record, it is necessary that the case be retried. Accordingly, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

HARL, P.J. AND DEVIN E. SULLIVAN, J. CONCUR.

38262

In Re: ESTATE OF ALFONSINA GONNELLA, Deceased,

JULIA DIVITO, Appellant,

v.

HILDA GONNELLA, Administratrix, Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

284 I.A. 645

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in the Circuit Court of Cook County, in which court the case was tried upon the petition of the petitioner and the amended answer of the administratrix as respondent. The jury returned a verdict finding the issues for the respondent, Hilda Gonnella; that there was a valid gift from Alfonsina Gonnella to Hilda Gonnella of the four Italian Government bonds in question, of the value of $4,000, and that the title to said bonds was in Hilda Gonnella, the respondent. The court after denying the motion of the petitioner for a new trial and in arrest of judgment, entered judgment on the verdict.

The petition on which this action is based was filed in the Probate Court of Cook County in the matter of the Estate of Alfonsina Gonnella, deceased, by Julia Divito, alleging that she is a daughter and heir-at-law of the deceased; that at the time of her death, Alfonsina Gonnella was the owner of four bonds issued by the Italian government, of the value of $4,000 in American money, which bonds were deposited in a safety deposit box in the South Chicago Savings Bank; that after the death of said Alfonsina Gonnella, said Hilda Gonnella, the duly appointed administratrix of said estate, removed said bonds and they are now in her possession; that said Hilda Gonnella as such administratrix has filed in this cause her inventory and failed and neglected to include in

38282

In Re: ESTATE OF ALFONSINA CONNELLA, Deceased.	APPEAL FROM
JULIA SIVITO, Appellant.	CIRCUIT COURT
v.	COOK COUNTY.
MILDA CONNELLA, Administratrix, Appellee.	254 I.A. 645

MR. JUSTICE MEMRE DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in the Circuit Court of Cook County, in which court the case was tried upon the petition of the petitioner and the amended answer of the administratrix as respondent. The jury returned a verdict finding the issues for the respondent, Milda Connella; that there was a valid gift from Alfonsina Connella to Milda Connella of the four Italian Government bonds in question, of the value of $4,000, and that the title to said bonds was in Milda Connella, the respondent. The court after denying the motion of the petitioner for a new trial and in arrest of judgment, entered judgment on the verdict.

The petition on which this motion is based was filed in the Probate Court of Cook County in the matter of the estate of Alfonsina Connella, deceased, by Julia Sivito, alleging that she is a daughter and heir-at-law of the deceased; that at the time of her death, Alfonsina Connella was the owner of four bonds issued by the Italian government, of the value of $4,000 in American money, which bonds were deposited in a safety deposit box in the South Chicago Savings Bank; that after the death of said Alfonsina Connella, said Milda Connella, the duly appointed administratrix of said estate, removed said bonds and they are now in her possession; that said Milda Connella as such administratrix has filed in this cause her inventory and failed and neglected to include in

said inventory the said bonds; that said Hilda Gonnella collected interest on said bonds, amounting to $140, and has failed to inventory the same or to account therefor, and prays that Hilda Gonnella be required to file in said cause a new and corrected inventory therein and thereby accounting for said bonds and all interest collected thereon.

To this petition the said respondent, Hilda Gonnella, filed her amended answer in the Probate Court of Cook County, in which amended answer she admits that petitioner is a daughter and heir-at-law of said Alfonsina Gonnella, deceased, and denies that at the time of her death Alfonsina Gonnella was the owner of any bonds now in this respondent's possession, but states that this respondent has in her possession at this time four Italian government bonds, of the face value of $4,000, which bonds were purchased with the joint earnings of said Alfonsina Gonnella and this respondent, and respondent admits that at the time of the death of said Alfonsina Gonnella said bonds were deposited in the Safety Deposit Box A-4 in the vaults of the South Chicago Savings Bank.

Respondent further states in her amended answer that on or about July 18, 1932, said Alfonsina Gonnella and this respondent leased the said safety deposit box as joint tenants with the right of survivorship, and that said bonds were placed therein on that date, and that said lease and joint tenancy agreement were still in effect at the time of the death of said Alfonsina Gonnella; that said joint tenancy agreement was as follows:

"Box No. A-4 Chicago July 18, 1932.

It is hereby agreed that all articles and property at any time now in or which may hereafter be placed or contained in said safe or box, now do and shall, so long as they are contained therein, continue to belong to the renters, in

said inventory the said bonds; that said Hilda Connelly collected interest on said bonds, amounting to $140, and has failed to inventory the same or to account therefor, and prays that Hilda Connelly be required to file in said cause a new and corrected inventory therein and thereby accounting for said bonds and all interest collected thereon.

To this petition the said respondent, Hilda Connelly, filed her amended answer in the Probate Court of Cook County, in which amended answer she admits that petitioner is a daughter and next-of-kin of said Alphonsus Connelly, deceased, and denies that at the time of her death Alphonsus Connelly was the owner of any bonds now in this respondent's possession, but states that this respondent has in her possession at this time four Italian Government bonds, of the face value of $4,000, which bonds were purchased with the joint earnings of said Alphonsus Connelly and this respondent, and respondent admits that at the time of the death of said Alphonsus Connelly said bonds were deposited in the safety deposit box A-4 in the vaults of the South Chicago Savings Bank.

Respondent further states in her amended answer that on or about July 18, 1932, said Alphonsus Connelly and this respondent leased the said safety deposit box as joint tenants with the right of survivorship, and that said bonds were placed therein on that date, and that said lease and joint tenancy agreement were still in effect at the time of the death of said Alphonsus Connelly; that said joint tenancy agreement was as follows:

"Box No. A-4 Chicago July 18, 1932.

It is hereby agreed that all articles and property at any time now in or which may hereafter be placed or contained in said vault or box, may be and shall, so long as they are contained therein, continue to belong to the renters, in

joint tenancy, with the right to survivorship therein, and may be withdrawn and removed therefrom, in whole or in part, by all, or any one or more of the Renters; and upon the death of any one or more of the Renters, the title to all articles and property contained therein shall, upon every such death vest, and be in the survivor or survivors jointly, with right of survivorship therein, and such survivor, or survivors, and any one or more of them, shall have the right to remove and withdraw from said safe or box all, or any part of the property, then, or at any time hereafter contained therein.

Under no circumstances whatsoever shall the Bank be held liable on account of the withdrawal or removal by all, or any one or more of the Renters, of all or any articles or property from said safe or box, whether now, or at any time hereafter contained therein.

This slip duly attached to contract No. 7963 of the South Chicago Savings Bank becoming a part thereof.

Signature: Alfonsina Gonnella (Seal)
Signature: Hilda Gonnella (SEAL)
South Chicago Savings Bank
By F. E. Borich. Cashier."

Respondent further says that said bonds were never removed from said safety deposit box since the date they were placed therein, July 18, 1932, until after the death of said Alfonsina Gonnella; that respondent then took manual possession of said bonds in pursuance to her agreement with said Alfonsina Gonnella and in conformity with her absolute contractual rights therein.

Respondent further says that said Alfonsina Gonnella, prior to her death, gave said Italian government bonds to respondent as her absolute property, and surrendered all her right, title, control and dominion in and to said bonds to respondent; that it was understood that said bonds and the contents of said safety deposit box were the property of respondent, and, particularly, that upon the death of said Alfonsina Gonnella, said bonds were not to be a part of her estate because said Alfonsina Gonnella felt respondent was entitled to said bonds since respondent had worked continuously for six and one-half years prior to her mother's death, and had given her entire salary to her said mother during this period; that her salary during said period amounted to approximately $7,000; that said Alfonsina Gonnella had no other income or means of support but said salary of

joint tenancy, with the right to survivorship therein, and may be sighted and removed therefrom, in whole or in part, by all, or any one or more of the makers; and upon the death of any one or more of the makers, the title to all articles and property contained therein shall, upon every such death vest, and begin the survivor or survivors jointly, with right of survivorship therein, and such survivor, or survivors, and any one or more of them, shall have the right to remove and withdraw from said safe or box all, or any part of the property, then, or at any time hereafter contained therein.

Under no circumstances whatsoever shall the safe be held liable on account of the withdrawal or removal by all, or any one or more of the makers, of all or any articles or property from said safe or box, whether now, or at any time hereafter contained therein.

This slip duly attached to contract no. 7265 of the South Chicago Savings Bank becoming a part thereof.

Signature: Florence Connelly (Seal)
Signature: Hilda Connelly (Seal)
South Chicago Savings Bank
By E. K. Gorich, Cashier."

Respondent further says that said bonds were never removed from said safety deposit box since the date they were placed therein, July 18, 1932, until after the death of said Florence Connelly; that respondent then took manual possession of said bonds in pursuance to her agreement with said Florence Connelly and in conformity with her absolute contractual rights therein.

Respondent further says that said Florence Connelly, prior to her death, gave said Illinois government bonds to respondent as her absolute property, and surrendered all her right, title, control and dominion in and to said bonds to respondent; that it was understood that said bonds and the contents of said safety deposit box were the property of respondent, and, particularly, that upon the death of said Florence Connelly, said bonds were not to be a part of her estate because said Florence Connelly felt respondent was entitled to said bonds since respondent had worked continuously for six and one-half years prior to her mother's death, had given her entire salary to her said mother during this period; that her salary during said period amounted to approximately $[illegible]; that said Florence Connelly had no other income or means of support but said salary of

respondent and her own meager earnings; and that said Alfonsina Gonnella on divers occasions stated that in return for respondent's care, consideration and support said bonds were respondent's absolute property.

Respondent further states that Julia Divito, petitioner, was married about five years ago and has lived with her husband since said marriage, and did not assist said Alfonsina Gonnella financially or in any other way during this period; but that Julia Divito became indebted to said Alfonsina Gonnella during her lifetime for a large sum of money, for rent, loans and advances made to Julia Divito from time to time, no part of which sum has been repaid.

Respondent admits that she collected interest on said bonds, amounting to the sum of $140 and has not included said bonds nor said interest in her inventory for the reason that they are not assets of the estate of Alfonsina Gonnella.

Respondent therefore prays that said petition be dismissed.

The matter was heard in the Probate Court upon this petition and amended answer, on the 9th day of July, 1934, which court entered an order finding that the four Italian government bonds for $1,000 each belonged to Alfonsina Gonnella at the time of her death, and are the property of the estate of Alfonsina Gonnella, deceased, and not the property of Hilda Gonnella, and ordering said Hilda Gonnella, as administratrix of the estate of Alfonsina Gonnella, deceased, to inventory said four Italian government bonds and charge herself as such administratrix therewith and with all interest coupons thereon collected by her.

From this order Hilda Gonnella, administratrix, prayed an appeal to the Circuit Court of Cook County, and demanded a jury trial.

respondent and her own meager earnings; and that said Alfonsina Connelly on divers occasions stated that in return for respondent's care, consideration and support said bonds were respondent's absolute property.

Respondent further states that Julia Divito, petitioner, was married about five years ago and has lived with her husband since said marriage, and did not assist said Alfonsina Connelly financially or in any other way during this period; that that Julia Divito became indebted to said Alfonsina Connelly during her lifetime for a large sum of money, for rent, loans and advances made to Julia Divito from time to time, no part of which has been repaid.

Respondent admits that she collected interest on said bonds, amounting to the sum of $140 and has not included said bonds nor said interest in her inventory for the reason that they are not assets of the estate of Alfonsina Connelly.

Respondent therefore prays that said petition be dismissed.

The matter was heard in the probate Court upon this petition and amended answer, on the 9th day of July, 1924, which court entered an order finding that the four Liberty Government bonds for $1,000 each belonged to Alfonsina Connelly at the time of her death, and are the property of the estate of Alfonsina Connelly, deceased, and not the property of Hilda Connelly, and ordering said Hilda Connelly, as administratrix of the estate of Alfonsina Connelly, deceased, to inventory said four Liberty Government bonds and on her bond as such administratrix therewith and with all interest coupons thereon collected by her.

From this order Hilda Connelly, administratrix, prayed an appeal to the Circuit Court of Cook County, and demanded a jury trial.

From the evidence heard by the court and the jury it appears that Alfonsina Gonnella, deceased, came to this country in 1910, with her sister Julia Bonanimo; that neither of the sisters at that time understood the English language. Alfonsina Gonnella attended no schools here, and what knowledge she had of the English language she acquired during the time she resided and remained in this country. She had two children, Julia, the petitioner, and Hilda, the respondent. In January, 1935, the husband of Alfonsina Gonnella had been and was confined in the Insane Asylum at Dunning, Illinois. Alfonsina Gonnella died on July 29, 1933, intestate, and at the time of her death it was claimed she was the owner of four Italian government bonds of the par value of $1,000 each, and $300 in United States Postal Certificates, which were in the safety deposit box rented by her July 18, 1932, at the South Chicago Savings Bank.

There does not seem to be any controversy regarding the fact that the earnings of Hilda Gonnella were received by her mother from the time she was employed until July 18, 1932. From respondent's evidence it appears that she earned from $20 to $25 a week. Alfonsina Gonnella, upon the incarceration of her husband in the Insane Asylum, which occurred in 1919, was left with two small children, Julia, then about 9 years old, and Hilda, 7 years old, to support and educate. As each of the girls left school, she went to work and her earnings went into the family funds. Through the efforts of herself and the two girls, Alfonsina Gonnella accumulated the money to pay the mortgage on the home, and to pay for the bonds in question and the Postal Certificates.

There was introduced in evidence the Joint Tenancy Agreement, dated Chicago, July 18, 1932, which is fully set forth in the pleadings in this case. From this agreement it appears that it was attached to Contract No. 7963 of the South Chicago Savings

From the evidence heard by the court and the jury it appears that Alfonsina Connelly, deceased, came to this country in 1910, with her sister Julia Zonnsimo; that neither of the sisters at that time understood the English language. Alfonsina Connelly attended no schools here, and what knowledge she had of the English language she acquired during the time she resided and remained in this country. She had two children, Julia, the petitioner, and Hilda, the respondent. In January, 1925, the husband of Alfonsina Connelly had been and was confined in the Insane Asylum at Dunning, Illinois. Alfonsina Connelly died on July 23, 1932, intestate, and at the time of her death it was claimed she was the owner of four Italian government bonds of the par value of 4,000 each, and 2000 in United States Postal Savings, which were in the safety deposit box rented by her July 18, 1932, at the South Chicago Savings Bank.

There does not seem to be any controversy regarding the fact that the earnings of Hilda Connelly were received by her mother from the time she was employed until July 18, 1932. From respondent's evidence it appears that she earned from $20 to $25 a week. Alfonsina Connelly, upon the incarceration of her husband in the Insane Asylum, which occurred in 1912, was left with two small children, Julia, then about 3 years old, and Hilda, 7 years old, to support and educate. As each of the girls left school, she went to work and her earnings went into the family funds. Through the efforts of herself and the two girls, Alfonsina Connelly accumulated the money to pay the mortgage on the home, and to pay for the bonds in question and the Postal Certificates.

There was introduced in evidence the joint tenancy agreement, dated Chicago, July 18, 1932, which is fully set forth in the pleadings in this case. From this agreement it appears that it was attached to Contract No. 7523 of the South Chicago Savings

Bank, and became a part thereof and subject to its terms. Contract No. 7963 is entitled "Safe Deposit Lease" and is between the South Chicago Savings Bank and A. Gonnella; was signed by her, and bears date July 18, 1932.

As part of the evidence in this case there is written across each of the bonds the name of Hilda Gonnella. The respondent testified to facts that occurred after July 29, 1933, the date of her mother's death. The bonds in question were offered in evidence and the court in an examination of the bonds found the name, "Hilda Gonnella" written on each bond, and inquired, out of the presence of the jury, as to when it was written. From the testimony of respondent the name was written on July 18, 1932, by her, and was not put on the bonds after her mother died. On cross-examination of this witness, in the presence of the jury, she stated that the name was written in her own handwriting, and that it was put on by her July 18, 1932; the date she entered into the joint tenancy agreement with her mother and the South Chicago Savings Bank; that it was on the bonds when she was a witness in the Probate Court, and that Mrs. Palenta was at the bank when the name was written on by her.

This testimony of the respondent was contradicted by that of Walter Divito, the husband of the petitioner. He stated the respondent turned the bonds over to him for safe-keeping after her mother died on July 29, 1933, and their removal from the box by her, and that her name was not written on any of the bonds when they were removed from the box by her; that her name was not on these bonds at that time.

Several witnesses testified as to the ability of the deceased in her lifetime to speak and understand the English language, and also as to her remark that she wanted Hilda Gonnella to have all that she had.

bank, and become a part thereof and subject to its terms. Contract No. 7983 is entitled "State Deposit Loans" and is between the South Chicago Savings Bank and A. Donnelly, was signed by her, and bears date July 18, 1932.

As part of the evidence in this case there is written across each of the bonds the name of Hilda Donnelly. The respondent testified to facts that occurred after July 22, 1932, the date of her mother's death. The bonds in question were offered in evidence and the court in an examination of the bonds found the name, "Hilda Donnelly" written on each bond, and inquired, out of the presence of the jury, as to when it was written. From the testimony of respondent the name was written on July 18, 1932, by her, and was not put on the bonds after her mother died. On cross-examination of this witness, in the presence of the jury, she stated that the name was written in her own handwriting, and that it was put on by her July 18, 1932; the date she entered into the joint tenancy agreement with her mother and the South Chicago Savings Bank; that it was on the bonds when she was a witness in the probate Court, and that was. Patents are at the bank when the name was written on by her.

This testimony of the respondent was corroborated by that of Walter Dirito, the bookman of the petitioner. He stated the respondent turned the bonds over to him for safe-keeping after her mother died on July 22, 1932, and that removal from the box by Mr. and that her name was not written on any of the bonds when they were removed from the box by her; that the name was not on these bonds at that time.

Several witnesses testified as to the ability of the deceased in her lifetime to speak and understand the English language, and also as to her remark that she wanted Hilda Donnelly to have all that she had.

One of the points raised by the petitioner is that where title to property is claimed by gift, the burden of proof is on the donee to prove all the facts essential to a valid gift and such proof must be clear and convincing. This burden of proof is questioned by the respondent. However, in the trial of this case the court required the respondent to assume the burden, and it was upon this theory that the case was tried. Therefore, it is not necessary to pass upon the question at this time.

The evidence established that the respondent, on July 18, 1932, had possession of the bonds, although there is some controversy as to this fact, and that her name was written across each one of the bonds in ink, in the presence of her mother, the same date on which the joint tenancy agreement and the lease for Box No. A-4 were signed. The joint tenancy agreement bears the signatures of Alfonsina Gonnella, Hilda Gonnella, and the South Chicago Savings Bank, by F. E. Borich, Cashier, but the lease for the safety deposit box is identified as Box No. A-4, and bears the number 7963, and was executed by Alfonsina Gonnella and the South Chicago Savings Bank, by F. E. Borich, and made a part of the joint tenancy agreement, and in order to pass upon the questions involved in this litigation, it will be necessary to construe these contracts as one, and that they are, is clear from the fact that the joint tenancy agreement is attached to Contract No. 7963 of the South Chicago Savings Bank and is a part thereof.

The petitioner contends that the fact a third person's name is annexed to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who signed it and are mentioned in it, such third party does not thereby become a party to it. However, this rule which the petitioner seeks to apply is not controlling, for the reason that we find upon an examination of the lease and the joint tenancy agreement that by its

One of the points raised by the petitioner is that where title to property is claimed by gift, the burden of proof is on the donee to prove all the facts essential to a valid gift and such proof must be clear and convincing. This burden of proof is questioned by the respondent. However, in the trial of this case the court required the respondent to assume the burden, and it was upon this theory that the case was tried. Therefore, it is not necessary to pass upon the question at this time.

The evidence established that the respondent, on July 18, 1882, had possession of the bonds, although there is some controversy as to this fact, and that her name was written across each one of the bonds in ink, in the presence of her mother, the same date on which the joint tenancy agreement and the lease for Box No. 1-4 were signed. The joint tenancy agreement bears the signatures of Alfonsina Connelly, Hilda Connelly, and the South Chicago Savings Bank, by M. E. Bostick, Cashier, and the lease for the safety deposit box is identified as Box No. 1-4, and bears the number 7282, and was executed by Alfonsina Connelly and the South Chicago Savings Bank, by M. E. Bostick, and made a part of the joint tenancy agreement, and is under to pass upon the questions involved in this litigation, it will be necessary to examine these contracts, as one, and that they are, in order from the fact that the joint tenancy agreement is attached to Contract No. 7282 of the South Chicago Savings Bank and is a part thereof.

The petitioner contends in a [illegible] a joint tenant's name is annexed to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who signed it and are mentioned in it, such third party does not thereby become a party to it. However, this rule which the petitioner seeks to apply is not controlling, for the reason that we find upon an examination of the lease and the joint tenancy agreement that by its

terms it is to be considered as one contract entered into by the parties. The facts as they appear in the record indicate that Hilda Gonnella received these bonds and they were in her possession at the time these instruments were signed at the South Chicago Savings Bank. These facts tend to establish that a gift was made by her mother to this respondent at that time, and the question arises: Did she lose any rights by depositing the bonds in the safe deposit box? It is evident from this joint tenancy agreement that she could withdraw the bonds from the safety box at any time she desired, and it was as much for her benefit as for that of her mother that the agreement was signed by the parties, by which the survivor was to have title to the contents of the box, and if the bonds were in the box they would inure to such survivor.

The petitioner makes this further suggestion: That a person cannot convey to himself a joint tenancy in property of which he is already the complete owner, and an instrument purporting to make such a conveyance to himself and a third person, under such circumstances, conveys no interest to either. Assume now that Hilda Gonnella did have title to these bonds, she could, of course, have entered into a contract that in case of her death the ownership of the bonds should be in her mother. It is to be noted from the contract itself in the instant case that "the title to all articles and property contained therein shall, upon every such death, vest and be in the survivor or survivors jointly, with right of survivorship therein, and such survivor, or survivors, and any one or more of them, shall have the right to remove and withdraw from said safe or box all, or any part of the property, then, or at any time hereafter contained therein."

The petitioner contends that the fact respondent wrote her name on these bonds would not constitute a gift or transfer of title

terms it is to be considered as one contract entered into by the parties. The facts as they appear in the record indicate that Nilda Donnella received these bonds and they are in her possession at the time these instruments were signed at the South Chicago savings Bank. There seems land to establish that a gift was made by her mother to this respondent at that time, and the question arises: did she lose any rights by designating the bonds in the safe deposit box? It is evident from this joint tenancy agreement that she could withdraw the bonds from the safety box at any time she desired, and it was as much for her benefit as for that of her mother that the agreement was signed by the parties, by which the survivor was to have title to the contents of the box, and if the bonds were in the box they would inure to such survivor.

The petitioner argue this another proposition: That a person cannot convey to himself a joint tenancy in property of which he is already the complete owner, and an instrument purporting to make such a conveyance to himself and a third person, under such circumstances, conveys no interest to either. Assume now that Nilda Donnella did have title to these bonds, she said, of course, here entered into a contract that in case of her death the ownership of the bonds should be in her mother. It is to be noted from the contract itself is the instant case that "the title to all articles and property contained therein shall, upon such death, vest and be in the survivor or survivors jointly, with right of survivorship thereto, and such survivor, or survivors, and any one or more of them, shall have the right to remove the articles from said safe or box all, or any part of the property, then, or at any time thereafter contained therein."

The petitioner contends that the lower respondent vest her name on these bonds could not constitute a gift or transfer of title

to her. However, it does appear from what we have said in our opinion that before the agreement was entered into by the parties at the office of the South Chicago Savings Bank, respondent had possession of these bonds, and apparently what was done at that time was done in the presence of all the parties, and this court is of the opinion that it comes within the rule quoted by the petitioner in Telford v. Patton, 144 Ill. 611, wherein the court said:

> "It is essential to a donation inter vivos, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.'"

This rule has been approved by the Supreme Court in several cases, which have been called to our attention by the petitioner. The fact is that respondent had possession of the bonds, so there must have been delivery, and by delivery there was a change of possession so as to put it out of the power of Alfonsina Gonnella to repossess the bonds. However, as we have pointed out in our opinion, after respondent had possession of these bonds, she and her mother signed this joint tenancy agreement. This agreement was attached to and made a part of the lease for the safety deposit box, and was signed by Alfonsina Gonnella, mother of the respondent. The respondent being the owner of these bonds, no doubt entered into this agreement, which was signed by her mother as well as herself, for the purpose indicated in our opinion. The questions of fact before the court were passed upon by a jury and judgment was entered upon the verdict as to the ownership of the bonds, and from the record, we are unable to find that the judgment so entered was against the manifest weight of the evidence. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

to her. However, it does appear from what we have said in our opinion that before the agreement was entered into by the parties at the office of the South Orange Savings Bank, respondent had possession of these bonds, and apparently what was done at that time was done in the presence of all the parties, and this court is of the opinion that it comes within the rule cited by the petitioner in Taylor v. Sutton, 144 III. 611, wherein the court said:

> "It is essential to a donation inter vivos, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be 'such a change of possession as to put it out of the power of the giver to repossess himself of the thing given.'"

This rule has been approved by the Supreme Court in several cases, which have been called to our attention by the petitioner. The fact is that respondent had possession of the bonds, so there must have been delivery, and by delivery there was a change of possession so as to put it out of the power of Clemenia Donnelly to repossess the bonds. However, as we have pointed out in our opinion, after respondent had possession of these bonds, she and her mother signed this joint tenancy agreement. This agreement was attached to and made a part of the lease for the safety deposit box, and was signed by Clemenia Donnelly, mother of the respondent. The respondent being the owner of these bonds, no doubt entered into this agreement, which was signed by her mother as well as herself, for the purpose indicated in our opinion. The questions of fact before the court were passed upon by a jury and judgment was entered upon the verdict as to the ownership of the bonds, and from the record, we are unable to find that the judgment no entered was against the weight of the evidence. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HAIN, P.J., AND DANIEL E. SULLIVAN, J. DONOR.

38280

MELVIN L. STRAUS, as Trustee,
(Complainant) Appellee,
v.
ABRAHAM LIEBLING, et al.,
(Defendants).

SYLVIA BLUM, (Intervening Petitioner)
Appellant,
v.
MELVIN L. STRAUS, (Complainant),
and GEORGE W. ROSSETTER, JAY C. McCORD and SIDNEY H. KAHN, as the FINCHLEY BUILDING FIRST MORTGAGE BONDHOLDERS' COMMITTEE, (Respondents to Petition)
Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

264 I.A. 645

MR. JUSTICE MEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is in this court by the intervening petitioner, Sylvia Blum, from an order entered by the chancellor, after a hearing, that the amended petition of Sylvia Blum be dismissed for want of equity.

The original proceeding in this case was upon a bill of complaint to foreclose filed in the Circuit Court by the trustee, in which bill it is alleged that the defendant, Finchley Building Corporation owned a leasehold for a term of ninety-nine years on certain described real estate in the City of Chicago, and that this defendant executed bonds aggregating $750,000; that these bonds were secured by a trust deed, dated May 1, 1927, conveying the 99-year leasehold estate, together with all rights thereafter acquired in and to the real estate, buildings, standing upon the premises, and rents, issues and profits thereof, and because of certain defaults by this defendant in the payment of taxes - principal and interest, the bill sought to foreclose the lien of the trust deed upon the premises in question. There was also an incumbrance on this property of a

38880

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

254 I.A. 645

MELVIN I. STRAUS, as Trustee, (Complainant) Appellee, v. ABRAHAM LINCOLN, et al., (Defendants).	
SYLVIA BLUM, (Intervening petitioner) Appellant, v. MELVIN I. STRAUS, (Complainant). and GEORGE W. MOSKOWITZ, JAY G. MOSOND and ALBERT H. KAHN, as the FIDELITY BUILDING FIRST MORTGAGE BONDHOLDERS' COMMITTEE, (Respondents to Petition) Appellees.	

MR. JUSTICE DENIS DONAHUE DELIVERED THE OPINION OF THE COURT.

This appeal is in this court by the intervening petitioner, Sylvia Blum, from an order entered by the chancellor, after a hearing, that the amended petition of Sylvia Blum be dismissed for want of equity.

The original proceeding in this case was upon a bill of complaint to foreclose filed in the circuit court by the trustee, in which bill it is alleged that the defendant, Fidelity Building Corporation owned a leasehold for a term of ninety-nine years on certain described real estate in the city of Chicago, and that this defendant executed bonds aggregating $700,000; that these bonds were secured by a trust deed, dated May 1, 1927, covering the 99-year leasehold estate, together with all rights thereafter acquired in and to the real estate, buildings, standing upon the premises, and rents, issues and profits thereof, and because certain defaults by this defendant in the payment of taxes - principal and interest, the bill sought to foreclose the lien of the trust deed upon the premises in question. There was also an incumbrance on this property of a

second mortgage trust deed securing an issue of $50,000 bonds. Abraham M. Liebling and Samuel Greenspahn were the reputed owners of these leasehold bonds. Upon the issues joined in the original proceeding, the Chancellor on August 19, 1932, entered a decree for foreclosure and sale, but no sale was had of the premises securing payment of the bonds.

During the progress of the case, the trustees under the Last Will and testament of Clara F. Bass, deceased, the owners of the legal title to the property in question, filed their cross petition on June 20, 1934, to terminate the leasehold estate, in which petition it was alleged the various defaults in the payment of ground rent, amounting at that time to some $30,000, and of general real estate taxes aggregating about $60,000. It appears from this petition that the cross-petitioners had been enjoined from proceeding with the forcible detainer suit in the Municipal Court, and prayed that they might be permitted to terminate the lease.

As parties defendant to the cross petition there were: George W. Rossetter, Jay C. McCord and Sidney H. Kahn, comprising the Finchley Building First Mortgage Bondholders' Committee, who were the holders of first mortgage leasehold bonds, and also holders of second mortgage bonds.

On August 10, 1934, after hearing and on notice to all parties, a decree was entered on the cross petition of the trustees under the Last Will and Testament of Clara F. Bass, deceased, upon the answers of defendants appearing in said cause, and from the decree it appears that there were defaults in the aggregate amount of $118,147.75; that the lease was terminated and the trustee was directed to deliver the possession of the property to the trustees of Clara F. Bass, deceased, who were in turn directed to pay to the trustee in the original proceeding $65,000 for distribution to the holders of the first mortgage leasehold bonds.

second mortgage trust deed securing an issue of $30,000 bonds. Abraham M. Liebling and Samuel Greenspan were the reputed owners of these leasehold bonds. Upon the issues joined in the original proceeding, the Chancellor on August 19, 1932, entered a decree for foreclosure and sale, but no sale was had of the premises securing payment of the bonds.

During the progress of the case, the trustees under the last will and testament of Diana F. Dean, deceased, the owners of the legal title to the property in question, filed their cross petition on June 30, 1934, to terminate the leasehold estate, in which petition it was alleged the various defaults in the payment of ground rent, amounting at that time to some $80,000, and of general real estate taxes aggregating about $80,000. It appears from this petition that the cross-petitioners had been enjoined from proceeding with the forcible detainer suit in the municipal Court, and prayed that they might be permitted to terminate the lease.

As parties defendant to the cross petition there were: George V. Nonnetter, Jay G. Enquard and Sidney R. Kohn, comprising the Hamilton Building First Mortgage Bondholders' Committee, who were the holders of first mortgage leasehold bonds, and also holders of second mortgage bonds.

On August 10, 1934, after hearing and on notice to all parties, a decree was entered on the cross petition of the trustees under the last will and testament of Diana F. Dean, deceased, upon the answers of defendants appearing in said cause, and from the decree it appears that there were defaults in the aggregate amount of $118,147.78; that the lease was terminated and the trustee was directed to deliver the possession of the property to the trustees of Diana F. Dean, deceased, who were in turn directed to pay to the trustee in the original proceeding $58,000 for distribution to the holders of the first mortgage leasehold bonds

On August 16, 1934, the intervening petitioner filed her amended petition, in which she states the Bondholders' Committee agreed to purchase and petitioner agreed to sell to the Committee her second mortgage bonds in the principal sum of $25,000, secured by the trust deed upon the real estate in question, for $12,500. Of this sum $3,460.06 was to be paid to the firm of Lamborn, Hutchins & Co. for $25,000 of these bonds, with whom they had been hypothecated on her behalf by her father, Abraham Liebling; and $3,539.94 was to be paid to petitioner on account of the remainder of said bonds, and the balance of $5,500 was to be paid within eighteen months thereafter.

The trustee and the bondholders' committee filed an answer to this amended petition, denying that the Bondholders' Committee had obligated itself to pay the balance of $5500, and alleging that said sum was to be paid within eighteen months only if the Committee desired to exercise its option to do so.

It appears from the evidence that Abraham M. Liebling testified that his understanding with M. A. Rosenthal, Secretary of the Committee, was that $7,000 was to be paid immediately, part to Lamborn, Hutchins & Company, and part to him, and that the balance was to be paid in eighteen months; that being compelled to leave the city he delegated Irving Greenspahn to act as his attorney in the matter, and for that purpose signed a power of attorney, dated April 30, 1932, containing the representation that he was the owner of the bonds, and empowering Greenspahn, as his true and lawful attorney, to enter into an agreement with the Bondholders' Committee, which agreement provided that $25,000 aggregate principal amount of junior mortgage bonds of the Finchley Building Corporation, dated May 1, 1927, and owned by Liebling, were to be sold to the Committee for the sum of $3,539.94, and that the bonds were to be deposited in escrow with the Straus National Bank of Chicago, and the payment of $5,500

On August 10, 1934, the intervening petitioner filed her amended petition, in which she states the bondholders' Committee agreed to purchase and petitioner agreed to sell to the Committee her second mortgage bonds in the principal sum of $25,000, secured by the trust deed upon the real estate in question, for $19,500. Of this sum $3,450.00 was to be paid to the firm of Lambourn, Butchins & Co. for $38,000 of these bonds, with whom they had been hypothecated on her behalf by her father, Abraham Michling; and $5,039.94 was to be paid to petitioner on account of the remainder of said bonds, and the balance of $5,500 was to be paid within eighteen months thereafter.

The trustee and the bondholders' committee filed an answer to this amended petition, denying that the bondholders' Committee had obligated itself to pay the balance of $5500, and alleging that said sum was to be paid within eighteen months only if the Committee desired to exercise its option to do so.

It appears from the evidence that Andrew M. Michling testified that his understanding with W. A. Rosenthal, Secretary of the Committee, was that $7,000 was to be paid immediately, part to Lambourn, Butchins & Company, and part to him, and that the balance was to be paid in eighteen months; that being concerned to leave the city he delegated Irving Greenebaum to act as his attorney in the matter, and for that purpose signed a power of attorney, dated April 30, 1935, containing the representation that he was the owner of the bonds, and empowering Greenebaum, as his true and lawful attorney, to enter into an agreement with the bondholders' Committee, which agreement provided that $19,000 aggregate principal amount of junior mortgage bonds of the Finnley Building Corporation, dated May 1, 1927, and owned by Michling, were to be sold to the Committee for the sum of $3,039.94, and that the bonds were to be deposited in escrow with the Illinois National Bank of Chicago, and the payment of $5,500

was to be made on or before eighteen months from May 1, 1933 to said escrowee, upon delivery of the bonds upon the order of the Committee. Irving Greenspahn, being authorized by the power of attorney of Abraham Liebling executed the escrow agreement.

The question in dispute is as to the payment of the $5,500 claimed to be due the intervening petitioner in this matter.

A contract was entered into between the Bondholders' Committee and Greenspahn, who acted under the terms of his power of attorney. It appears from the record that a draft of this document known as an escrow agreement was submitted to Greenspahn before it was executed, and that he suggested several changes in the contract, which were incorporated.

From the record it is apparent that Greenspahn had an opportunity to read the contract - the subject of the dispute - and if it was not in accordance with the powers given to him, he should have objected, but he did not object; on the contrary he signed the contract for and on behalf of the parties. Then in accordance with the performance of this contract, the sum of $3,460.06 was paid to Lamborn, Hutchins & Company so as to release these bonds, and the further sum of $3,539.94, was paid by this Committee to petitioner. If there was any objection to the form of this contract the intervening petitioner should have objected before these payments were made and not accepted part performance by the receipt of certain money and afterwards raised the question that the contract was not in the form understood by the parties. No charge is made that fraudulent representations were made, but recovery is sought by petitioner on the ground that the oral contract was obligatory upon the parties that the written contract was but evidence of their agreement. This cannot be, for the reason that the contract was executed by the parties and is evidence of their previous negotiations. The contract itself does not provide absolutely that the Bondholders' Committee

was to be made on or before eighteen months from July 1, 1921 to said
accrued, upon delivery of the bonds upon the order of the Committee.
Irving Greenebaum, being authorized by the order of attorney of
Abraham Liebling executed the escrow agreement.

The question in dispute is as to the payment of the
$8,000 claimed to be due the intervening petitioner in this matter.

A contract was entered into between the Montmorenci
Committee and Greenebaum, who acted under the terms of his power of
attorney. It appears from the record that a draft of this document
known as an escrow agreement was submitted to Greenebaum before it
was executed, and that he suggested several changes in the contract,
which were incorporated.

From the record it is apparent that Greenebaum had an
opportunity to read the contract - the subject of the dispute - and
if it was not in accordance with the terms given to him, he should
have objected, but he did not object; on the contrary he signed the
contract for and on behalf of the parties. Then in accordance with
the performance of this contract, the sum of $[illegible] was paid to
Langdon, Hutchins & Company so as to release these bonds, and the
further sum of $[illegible], was paid to the Committee to petitioner.
If there was any objection to the form of this order of the intervening
petitioner would have objected before these payments were made
and not thereafter. Not withstanding by the [illegible] of [illegible] money
and Greenebaum raised the question that the contract was not in the
form indicated by the parties. No charge is made that fraudulent
representations were made, but recovery is sought by petitioner on
the ground that the oral contract [illegible] the written one
that the written contract [illegible] of their agreement. This
cannot be, for the reason that the contract is entered by the
parties and is evidence of their previous [illegible]. The contract
itself does not provide absolutely that the Montmorenci Committee

will within eighteen months pay the balance of $5,500 due the purchase of the second mortgage bonds, but provides that the Committee might within eighteen months from May 3, 1932 pay the further sum of $5,500, in which event the bonds were to be turned over to the Committee. If the Committee did not elect to exercise its option, $16,000 principal amount of the bonds were to be returned to Liebling, and $8,000 of the bonds were to be delivered to the Committee.

In the consideration of this case, the Chancellor was in a much better position than this court to judge of the credibility of the witnesses that appeared before him in order to determine the questions involved, and having reached the conclusion he did, there is nothing in the record which would justify our interference therewith, for the reason that the final order is not against the manifest weight of the evidence.

For the reasons stated in this opinion, the order of the Chancellor is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

will within eighteen months pay the balance of $8,500 due the purchase of the second mortgage bonds, but provides that the Committee might within eighteen months from May 1, 1932 pay the further sum of $8,500, in which event the bonds were to be returned over to the Committee. If the Committee did not elect to exercise its option, $18,000 principal amount of the bonds were to be returned to Bleeking, and $8,000 of the bonds were to be delivered to the Committee.

In the consideration of this case, the Chancellor was in a much better position than this court to judge of the credibility of the witnesses that appeared before him in order to determine the questions involved, and having reviewed the evidence he did, there is nothing in the record which would justify our interference therewith, for the reason that the final order is not against the manifest weight of the evidence.

For the reasons noted in this opinion, the order of the Chancellor is affirmed.

Order affirmed.

BAIN, P.J. AND MARIE E. SULLIVAN, J. CONCUR.

38330

G. A. BOSOMBURG, etc.,
Appellant,

v.

GEORGE TRAKAS,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

224 I.A. 645

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This replevin action originated before Roy F. Nix, Justice of the Peace, at River Forest, Cook County, Illinois, upon the filing of an affidavit in the replevin action by G. A. Bosomburg, as the attorney and duly authorized agent of Agnes Basch, in which it is stated that George Trakas wrongfully detained goods and chattels from the said Agnes Basch. Thereupon the Justice of the Peace issued a replevin writ, which was delivered to F. H. Brasie, a constable in and for said county, for service, and he returned said writ the 12th day of January, 1935, that he was unable to find the goods and chattels described and could not cause the same to be returned to the plaintiff. Thereafter on January 15, 1935, the matter was heard upon a change of venue before William Rogers, a Justice of the Peace, of Cook County, Illinois, at which time G. A. Bosomburg was permitted by the court to represent Agnes Basch, the plaintiff, and it appears from the transcript filed herein that the court found the issues for the plaintiff, and upon such finding the court entered judgment against the defendant for the sum of $350. Thereafter the defendant filed his appeal bond in the Circuit Court of Cook County. Supersedeas was issued by the Clerk and a return by the sheriff of Cook County that he served this writ on William P. Rogers, Justice of the Peace.

On April 1, 1935, on motion of the attorney for the defendant,

38330

G. A. GOSSNEY, etc.,	Appellee,
Appellants,	
v.	
ALONZO TUCKER,	Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE HIGBEE DELIVERED THE OPINION OF THE COURT.

This replevin action originated before Y. Ma, Justice of the Peace, at River Forest, Cook County, Illinois, upon the filing of an affidavit in the replevin action by G. A. Gossney, as the attorney and duly authorized agent of James Wood, in which it is stated that Alonzo Tucker wrongfully detained goods and chattels from the said James Wood. Thereupon the Justice of the Peace issued a replevin writ, which was delivered to G. A. Gossney, a constable in and for said county, for service, and he returned said writ the 16th day of January, 1925, that he was unable to find the goods and chattels described and could not locate the same to be returned to the plaintiff. Thereafter, on January 16, 1925, the matter was heard upon a change of venue before Charles Myers, a Justice of the Peace, of Cook County, Illinois, at which time G. A. Gossney was represented by the court as attorney upon behalf, the plaintiff, and it appears from the transcript filed herein that the court found the issues for the plaintiff, and upon such finding the court entered judgment against the defendant for the sum of $250. Thereafter the defendant filed his appeal bond in the Circuit Court of Cook County. Appellees are issued to the State and a return by the sheriff of Cook County that he served this writ on Charles C. Myers, Justice of the Peace.

On April 1, 1925, on motion of the attorney for the defendant,

the cause was heard in the Circuit Court, on appeal, and plaintiff not appearing, the court found for the defendant that he have judgment against the plaintiff and that the property seized is the property of the defendant, and plaintiff was ordered to return the same so unlawfully seized, and that the Clerk issue a writ of retorno habendo.

Upon motion of G. A. Bosomburg it appears that there was want of service of summons upon the plaintiff, Agnes Basch, or against said G. A. Bosomburg, and that the court was without jurisdiction to enter judgment in this case.

Thereafter, on May 9, 1935, judgment was again entered in the Circuit Court of Cook County, wherein the court considered the transcript of record of the Justice of the Peace and the documentary evidence, and again found that the defendant was entitled to possession of the goods and chattels described in the writ of replevin and wrongfully detained, and that they should be returned to the defendant forthwith. On motion of the defendant, a writ of retorno habendo was issued. On an appeal of this character the cause must be tried de novo.

The defendant in an effort to sustain the judgment, has made misledding statements, first that the return of the constable was, in effect, false, that the property in this replevin action was seized and delivered to the plaintiff; second, that the transcript of the Justice of the Peace was changed sometime after trial was had, in that the name Agnes Basch, plaintiff, was inserted without notice to the defendant. These statements are not supported by the record. It was also stated by the defendant in his brief that an agreed statement of facts was considered by the trial court when the hearing was had on May 9, 1935, and judgment entered. We have examined the record, but are unable to find an agreed statement of facts, and are led to the conclusion that the reason for making

the cause was heard in the circuit court, on appeal, and plaintiff not appearing, the court found for the defendant in a new judgment against the plaintiff and that the property replevied is the property of the defendant, and plaintiff was ordered to return the same so wrongfully replevied, and that the clerk issue a writ of retorno habendo.

Upon motion of T. X. Boneshory it appears that there was want of service of summons upon the plaintiff, James Brown, or against said G. T. Boneshory, and that the court was without jurisdiction to enter judgment in this case.

Thereafter, on May 9, 1952, judgment was again entered in the circuit court of Cook County, wherein the court considered the transcript of record of the justice of the peace and the concentry evidence, and again found that the defendant was entitled to possession of the goods and chattels replevied in the writ of replevin and wrongfully detained, and that they should be returned to the defendant forthwith. On motion of the defendant, a writ of retorno habendo was issued. On an appeal of this matter the cause must be tried de novo.

The defendant in an effort to sustain the judgment, has made misleading statements, first that the return of the contestable was, in effect, false, that the property in this replevin action was seized and delivered to the plaintiff; second, that transcript of the justice of the peace was changed somewhere after trial was had, in that the name of one Brown, plaintiff, was inserted without notice to the defendant. These statements are not supported by the record. It was also stated by the defendant in his brief that an agreed statement of facts was considered by the trial court when the hearing was had on May 1, 1952, and judgment entered. We have examined the record, but are unable to find an agreed statement of facts, and are led to the conclusion that the reason for asking

such a statement was to deceive this court.

It is evident that the real party in interest is the plaintiff Agnes Basch, who was not summoned as required by law where the appeal is by the defendant from a judgment entered by a Justice of the Peace and is perfected before the clerk of the Circuit Court. The plaintiff not having been served by summons, the court did not have jurisdiction of the person at the time of the hearing, and the court therefore erroneously entered judgment, not alone in not having jurisdiction of the plaintiff, but in that no evidence was heard by the court upon the hearing except as to the transcript of the record of the Justice of the Peace and certain documentary evidence.

The trial court was misled and found that the property was wrongfully taken by the plaintiff and should be returned to the defendant, when as a matter of fact the writ of replevin was returned by the constable, "No property found."

Upon this state of the record the judgment is reversed and remanded with directions to the Circuit Court of Cook County to dismiss the appeal of George Trakas pending in that court, and that procedendo issue.

AND REMANDED
REVERSED WITH DIRECTIONS.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

such a statement was to deceive this court.

It is evident that the real party in interest in the plaintiff Agnes Beard, who was not summoned as required by law where the appeal is by the defendant from a judgment entered by a justice of the peace and is perfected before the clerk of the Circuit Court. The plaintiff not having been served by summons, the court did not have jurisdiction of the person at the time of the meeting, and the court therefore erroneously entered judgment, not alone in not having jurisdiction of the plaintiff, but in that no evidence was heard by the court upon the meeting except as to the transcript of the record of the justice of the peace and certain documentary evidence.

The trial court was misled and found that the property was wrongfully taken by the plaintiff and should be returned to the defendant, when as a matter of fact the writ of replevin was returned by the constable, "No property found."

Upon this state of the record the judgment is reversed and remanded with directions to the Circuit Court of Cook County to dismiss the appeal of George Franke pending in that court, and that proceeds have.

AND REMANDED

WAY, J. DISSENTING.

MILL, J.J. AND DAVIS P. BULLIVAN, J. CONCUR.

38348

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN S. RUSCH,

Defendant in Error,

v.

BEN E. SCHWARTZ, et al., HERMAN BROWN,

Plaintiff in Error.

WRIT OF ERROR TO COUNTY COURT COOK COUNTY.

284 I.A. 645

MR. JUSTICE WEBER DELIVERED THE OPINION OF THE COURT.

This is a writ of error issued on the application of Herman Brown for the purpose of reviewing the order of the County Court of Cook County finding the respondents, Herman Brown, Thelma Goldman, Ben E. Schwartz and Harry Schwed, guilty of a direct contempt while acting as judges and clerks at the election held on November 8, 1932, in the 13th precinct of the 39th Ward of the City of Chicago, in knowingly, fraudulently and unlawfully making a false canvass and return of the votes cast in said precinct at said election, and being guilty, as adjudged, of contempt, the court committed each of the respondents to the County Jail of Cook County for a period of ~~sixty~~ 60 days, unless sooner discharged in due course of law.

The same questions were passed upon by this court in the case of ~~The~~ People v. Ben E. Schwartz, ~~No. 38330,~~ 284 Ill. App. 3, and what we said in our opinion in that case upon the law and the facts is controlling in this proceeding. We quote from that case as follows:

"This action is based upon the provisions of Sec. 13 of the City Election Act, Ch. 46, ~~Par.~~ 287 of the Ill. State Bar Stats. 1935 ed., which provides:

"'And after confirmation and acceptance of such commission, such judges and clerks shall thereupon become officers of such court and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral

[illegible]

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN C. BROWN,

Defendant in Error,

v.

BEN E. COMMERIT, et al., HERMAN BROWN,

Plaintiff in Error.

Writ of Error to
County Court
of Cook County.

254 I.A. 645

MR. JUSTICE [illegible] delivered the opinion of the court.

This is a writ of error issued on the application of Herman Brown for the purpose of reviewing the order of the County Court of Cook County finding the respondents, Herman Brown, Thelma Coleman, Ben E. Commerit and Harry Cohen, guilty of a direct contempt while acting as judges and clerks at the election held on November 8, 1922, in the fifth precinct of the 38th ward of the City of Chicago, in knowingly, fraudulently and unlawfully making a false canvass and return of the votes cast in said precinct at said election, and being guilty, as adjudged, of contempt, the court committed each of the respondents to the County Jail of Cook County for a period of sixty days, unless sooner discharged in due course of law.

The same questions were raised upon by this court in the case of The People v. [illegible], [illegible] and what we said in our opinion in that case upon the law and the facts in controlling in this proceeding. [illegible] from in that case [illegible]:

"This action is based upon the provisions of sec. 12 of the City Election Act, sec. 22, ch. 24, 207 of the Ill. Stats Ann. Stats. 1923 ed., which provides:

'and after confirmation and acceptance of such commission, such judges and clerks shall thereupon become officers of such court and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral

testimony in a summary way, without formal pleadings, but such trial or punishment for contempt of court shall not be any bar to any proceedings against such officers, criminally, for any violation of this act.'

"The order of commitment is, in substance, as follows: That a general election was held in the City of Chicago on November 8, 1932, at which election various candidates of different political parties were voted upon for public office and various issues in the form of propositions were submitted to the voters for their approval; that at said general election in the 13th Precinct of the 39th Ward, said respondents, Ben K. Schwartz, Herman Brown, Thelma Goldman, Olga Boyd and Harry Schwed and each of them served as judges and clerks of said election and each of them by virtue of his respective office as judge and clerk of said general election was an officer of the County Court of Cook County in the State of Illinois.

"That at and during said election the said Ben K. Schwartz Herman Brown, Thelma Goldman and Harry Schwed, and each of them as judges of said election and clerk, knowingly, fraudulently and unlawfully made a false canvass and return of the votes cast in said precinct at said election.

"That the said respondents, Ben K. Schwartz, Herman Brown, Thelma Goldman and Harry Schwed, and each of them, by reason of the foregoing, was and is guilty of misconduct and misbehavior as an officer of the County Court of Cook County, State of Illinois, Olga Boyd, a clerk having been purged of any contempt, was discharged.

"The proceeding by the court is a summary one and is for a direct contempt of these election offici ls for misbehavior in their office, which was tried in open court on oral testimony without formal pleadings. And upon the hearing of evidence, the court entered the order finding the ~~respondents~~ guilty of a contempt as officers of the County Court of Cook County. The order of commitment was entered by the court after evidence was heard and the court found that the respondents served as judges and clerks at the election in question and as officers of the County Court of Cook County, and State of Illinois. The respondents as such officers of the court were found to have knowingly, fraudulently and unlawfully made a false canvass and return of the votes cast in the precinct of said election by the voters thereof.

"In determining whether the respondent Herman Brown, together with the other officers, was guilty of misconduct, misbehavior or violation of the election law as an officer of the court, we find that the election law, which controls the election in question, provides under Par. 333, ch. 46, Elections:

"'Every judge of election, member of any board of canvassers, messenger, poll clerk or other officer

Ill. State Bar Stats. 1935,

to tiny in a summary way, without formal pleadings, but such trial or punishment for contempt of court shall not be by law to any proceedings against such officers, criminally, for by violation of this act.'

"The order of commitment is, in substance, as follows: That a general election was held in the city of Chicago on November 8, 1892, at which election various candidates of different political parties were voted upon for public offices and various issues in the form of propositions were submitted to the voters for their approval; that at said general election in the 12th precinct of the 35th and said respondents, Ten . . Oberertz, Herman Brown, Thelma Goldman, Olaf Hoyd and Harry Schmed and each of them served as judges and clerks of said election and each of them by virtue of his respective office as judge and clerk of said general election was an officer of the county court of Cook County in the state of Illinois.

"That at and during said election the said Ben C. Oberertz, Herman Brown, Thelma Goldman and Harry Schmed, and each of them as judges of said election and clerk, knowingly, fraudulently and unlawfully made a false canvass and return of the votes cast in said precinct at said election.

"That the said respondents, Ben . . Oberertz, Herman Brown, Thelma Goldman and Harry Schmed, and each of them, by reason of the foregoing, are and is guilty of misconduct and misbehavior as an officer of the County Court of Cook County, State of Illinois, which Boyd a clerk having been charged of any contempt, are charged.

"The proceedings by the court in a summary way and is for a direct contempt of these elections of law in for misbehavior in their of law, which was tried in open court on oral testimony without formal pleadings. and upon the hearing of evidence, the court entered the order finding the respondents guilty of a contempt in of laws of the County Court of Cook County. The order of commitment was entered by the court after evidence was heard and the court found that the respondents served as judges and clerks of the election in question and as officers of the County Court of Cook County, and state of Illinois. The respondents as such officers of the court were found to have knowingly fraudulently and unlawfully made a false canvass and return of the votes cast in the precinct of said election by the voters thereof.

"In determining whether the respondent Herman Brown, together in the other filings, was guilty of misconduct, a misbehavior in violation of the election law as an officer of the court, we find that the election law, which o criminal the election is material, provides on . . 107, ch. 46 — Elections:

"'Every judge of election, member of any board of o provides, secretary, poll clerk or other officer

authorized to take part in, or perform any duty in relation to, any canvass, or official statement of the votes cast at any election in any precinct, or in any city, village or incorporated town, who shall wilfully make any false canvass of said votes;

"Or shall make, sign, publish or deliver any false return of such election, or any false certificate or statement of the result of such election, knowing the same to be false . . .

"Shall, on conviction thereof, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than five nor more than ten years.'

"So it would seem from this provision that these election officials as officers of the County Court were found guilty of returning a false canvass of the votes cast in the precinct where they were officiating at the time in question.

"The Respondent, however, contends that in a proceeding for a direct contempt the law requires that the order of commitment shall set out all of the facts constituting the offense with sufficient particularity and certainty to justify the punishment. From the order in the instant case, it appears that a rule was entered against the respondents and oral answers were made to the rule by each of the respondents, and they being present in court and attended by counsel, the court heard evidence, and it is from the evidence, which the statute provides may be orally taken, that this respondent, together with others, was found guilty, and the statute providing that such misbehavior of the election officials is a direct contempt, the Supreme Court in the case of The People v. White, 334 Ill. 465, said:

'. . . the county court is given jurisdiction to supervise the honest conduct of elections, and judges and clerks who are appointed by that court are officers thereof. Their misconduct, therefore, is the misconduct of officers of the county court. The rule long established both at common law and in equity is, that the legislature may not restrict the jurisdiction of the court in contempt proceedings but the power to punish for contempt is inherent in the court.'

Citing State of Illinois v. Froelich, 316 Ill. 77; People v. Panchire, 311 Ill. 622.

"The contempt proceeding in this case was conducted in a summary manner, and the order was entered upon the evidence heard by the court. This evidence, however, was not preserved in any way in the record, so that we have but one duty to perform, and that is to presume that the court heard sufficient evidence to justify the order entered finding the respondent guilty and inflicting punishment. This court in passing upon this question in People ex rel. Jeske v. Burke, 247 Ill. App. 220, a somewhat similar case, held

authorized to take part in, or perform any duty in relation to, any canvass, or official statement of the votes cast at any election in any precinct, or in any city, village or incorporated town, who shall willfully make any false canvass or said votes;

"Or who shall make, sign, publish or deliver any false return of such election, or any false certificate or statement of the result of such election, showing the same to be false ....

"Shall, on conviction thereof, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than five nor more than ten years.'

So it would seem from this provision that these election officials or officers of the county court were found guilty of returning a false canvass of the votes cast in the precinct where they were officiating at the time in question.

"The respondent, however, contends that in proceeding for a direct contempt the law requires that the order of commitment shall set forth all of the facts constituting the offense with sufficient particularity and certainty to justify the punishment. From the order in the instant case, it appears that a rule was entered by reason of the recommendations and oral answers made to the rule by each of the respondents, and they being present in court and attended by counsel, the court heard evidence, and it is from the evidence, which the statute provides may be orally taken, that this respondent, together with others, was found guilty, and the statute provides that such member of the election office is a direct contempt.

the supreme court in the case of The People v. Hill, 334 Ill. 455, said:

"... the county court is given jurisdiction to supervise the conduct of officers of elections, and judges and clerks who are appointed by the court, in officers thereof. Their misconduct, in effect, is the misconduct of an officer of the county court. The rule long established here, that common law is not in force in this state, that the legislature may not restrict the jurisdiction of the court in contempt proceedings, but the power to punish for contempt is inherent in the court.'

(citing cases of illinois). People, 334 Ill. 77; People v. Hopkins, 341 Ill. 86.

"The contempt here, if there was a contempt, was a misdemeanor in a summary manner, and the order may rest upon the evidence heard by the court. This evidence, however, was not preserved in any way in the record, so that, as in the instant case, only a question, and that is to presume that the court had sufficient evidence to justify the order. The question of the sufficiency of the indictment was not raised in the trial court. The court in deciding upon the question in People ex rel. People v. Burke, 347 Ill. 326, a comparatively earlier case, said

that the order was a proper one where evidence was heard in determining the guilt of the respondents for contempt, and said:

"'This matter comes to us on a record containing the pleadings and an order of the county court finding the plaintiff in error, defendant below, William Burke, guilty of contempt, of court and ordering him committed to the custody of the sheriff. There is no bill of exceptions although it appears from the commitment order that evidence was heard at the hearing of the cause, and the order of the court appears to be based upon that testimony.

"'It follows, necessarily, that while an order of court adjudging a defendant guilty should be carefully scanned for the purpose of finding that the court had jurisdiction, and that there were allegations in the order, sufficiently clear upon which to predicate a finding of guilty; nevertheless, it is also true that this court will presume that the evidence heard was sufficient to warrant the findings contained in the order of commitment.'

"From an examination of this record, we are unable to find that there were any objections made by this respondent at any time which would justify the court in going into the various questions raised. While the general rule is that the question of jurisdiction may be raised at any time, on the other hand, objection must be made by the defendant upon the trial to questions such as have been raised, in this case concerning the sufficiency of the order entered by the trial court, and unless he does so he is not in a position to complain in this court. People ex rel. Jeske v. Burke, supra. Other authorities have been called to our attention, but from an examination of the record, the order in question is not erroneous.

"The respondents also contend that the placita fails to show that the court was regularly organized at the time the respondents were committed, and therefore the order should be reversed, and points to the fact that the record does not show that the court was regularly convened at the time respondents were committed. The certificate in this particular case only certifies that it is a true, perfect and complete copy of the judgment order and praecipe, and while there is a convening order attached to this record, the praecipe does not call for the placita showing a convening of the court at the beginning of the term. The whole record of the cause is not before us, but only such part as the praecipe required should be prepared, which, as we have above stated, was the judgment order; and we assume from the fact that the record is not complete, there was a proper convening order, as required by law. Springer v. Haddock, 59 Ill. App. 40.

"We are of the opinion that the trial court did not err

that the order was a proper one where evidence was heard in determining the guilt of the recalcitrant contempt, and said:

'This matter comes to us on a record containing the pleadings and an order of the county court finding the plaintiff in error, defendant below, guilty of contempt, of court and ordering him committed to the custody of the sheriff. There is no bill of exceptions filed; it appears from the commitment order that evidence was heard at the hearing of the cause, and the order of the court appears to be based upon that testimony.

It follows, necessarily, that while an order of court adjudging a defendant guilty should be carefully examined for the purpose of finding that the court had jurisdiction, and that there were allegations in the order, sufficiently clear upon which to predicate a finding of guilty; nevertheless, it is also true that this court will presume that the evidence heard was sufficient to warrant the findings contained in the order of commitment.'

From an examination of this record, we are unable to find that there were any objections made by this respondent at any time which would justify the court in going into the various questions raised. While the general rule in the question of jurisdiction may be raised at any time, on the other hand, objection must be made by the defendant upon the trial to questions such as have been raised in this case concerning the sufficiency of the order entered by the trial court, and unless he does so he is not in a position to complain in this court. People ex rel. Jones v. Burke, supra. Other authorities have been called to our attention, but from an examination of the record, the order in question is not erroneous.

The case cited also pointed out that the plaintiff in error had shown that the court was regularly organized at the time the respondents were committed, and therefore the order should be reversed, due notice to the fact that the record does not show that the court was regularly convened at the time respondents were committed. The certificate in this proceeding does only certify that it is a true, correct and complete copy of the judgment order and proceeds, and while there is a convening order attached to this record, it or some does not call for the plaintiff error, a convening of the court at the beginning of the term. The whole record of the case is not before us, but only such part as the proceedings required should be produced, which, as we have stated, [illegible] the judgment order and we assume from the fact that the record is not complete, there was a proper convening order, or is wrong by law. Pulcher v. Buchanan, 90 Ill. App. 60.

We are of the opinion that the trial court did not err

in entering the order of commitment here on writ of error. Accordingly the action of the trial court is approved and the order affirmed."

Accordingly the order of contempt as against this respondent is affirmed.

ORDER AFFIRMED.

HALL, P. J., AND DENIS E. SULLIVAN, J., CONCUR.

in entering the order of commitment here on writ of error. Accordingly the action of the trial court is approved and the order affirmed."

Accordingly the order of contempt as against this respondent is affirmed.

ORDER AFFIRMED.

HILL, P. J., AND DAVIS & GULE, VAN, J., CONCUR.

37816

H. G. WOLFF COMPANY, a corporation, and EDWARD J. KELLEY,

(Complainants) Defendants in Error,

v.

JOSEPHINE B. GWYNNE, BROADWAY HALSTED BUILDING CORPORATION, a corporation, CHICAGO TITLE AND TRUST COMPANY, Trustee, SAMUEL M. EDISON, and the Unknown Owners of 540 Bonds Secured by Trust Deed Given to the Chicago Title and Trust Company, dated July 1, 1923,

(Defendants)

BROADWAY-HALSTED BUILDING CORPORATION, a Corporation,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

284 I.A. 646

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a mechanic's lien suit commenced in 1924, by the H. G. Wolff Company for plumbing work done and materials furnished under a contract with the Broadway-Halsted Building Corporation, the lessee. Josephine B. Gwynne, one of the defendants, was the owner of the fee. The building was located at the south corner of Halsted, Broadway and Grace streets, Chicago, Illinois.

The cause went to a decree and a finding was made in favor of the H. G. Wolff Company, a corporation, Edward J. Kelley, Trustee, as assignee, for the sum of $4,092.96, with interest thereon at five per cent per annum, from June 23, 1924, to July 12, 1926, making a total of $5,943.31. This was for work done and material furnished subsequent to March 11, 1924.

This case has been in this court before on a prior appeal, being Gen. No. 31335, entitled H. G. Wolff Company, a corp., complainant, and Frank P. Bauer Marble Company, a corp., Intervening Petitioner, v. Josephine B. Gwynne, et al, on appeal of Broadway Halsted Bldg. a corp., defendants, at which time it was found that the Wolff Company, complainant, had waived its right to a lien for

STATE

H. C. WOLF COMPANY, a corporation,
and EDWARD J. WOLF,

(Complainants) Defendants in Error,

v.

JOSEPHINE R. FRANK, ADMINISTRATRIX
BUILDING CORPORATION, a corporation,
CHICAGO TITLE AND TRUST COMPANY,
Trustee, EMMETT E. TAYLOR, and the
Unknown Owners of 940 bonds secured
by Trust Deed given to the Chicago
Title and Trust Company, dated July 1,
1928,

(Defendants)

BROADWAY-MILLED REALTY CORPORATION,
a corporation,
Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

284 I.A. 646

Mr. JUSTICE DENIS E. SULLIVAN delivered the opinion of the court.

This is a mechanic's lien suit commenced in 1934, by the H. C. Wolf Company for plumbing work done and materials furnished under a contract with the Broadway-Milton Building Corporation, the lessee. Josephine R. Frank, one of the defendants, was the owner of the fee. The building was located at the south corner of Fifth, Broadway and Grace streets, Chicago, Illinois.

The owner went to a lawyer and a finding was made in favor of the H. C. Wolf Company, a corporation, against J. Wolf, trustee, as assignee, for the sum of $4,087.80, with interest thereon at five per cent per annum, from June 7, 1934, to July 12, 1938, making a total of $6,043.31. This was for work done and material furnished subsequent to March 31, 1934.

This case has been in this court before on a prior appeal, being Gen. No. 41325, entitled H. C. Wolf Company, a corp., complainant, and Frank C. Bauer Audio Company, a corp., intervening petitioner, v. Josephine R. Frank, et al., on appeal of Broadway Milted Bldg., a corp., defendants, at which time it was found that the Wolf Company, complainant, had a lien right to a lien for

all work and materials furnished up to March 11, 1924, and as to what work and materials were furnished after March 11, 1924, the record did not show. The court at that time said:

> "The evidence of the witnesses on that subject is too vague to justify a definite finding. Further, there may have been other waivers of lien, similar to that of March 11, 1925, given by Wolff and Company, which, following what we have said above, would prevent a lien for the work and material furnished after March 11, 1924."

The reversal of the decree at that time and the remanding of the cause was for the evident purpose of inquiry as to whether any waiver of liens were given by the H. G. Wolff Company which applied to work and materials furnished subsequent to March 11, 1924. The cause was re-referred to a master and evidence was introduced showing the work and materials subsequently furnished, amounted to $4,092.96.

At the hearing before the master there was produced a witness on behalf of complainant who testified as to the work and materials furnished after March 11, 1924, and who testified as to the material that was delivered and the money that was paid for labor subsequent to that date.

During the hearing before the court an order was entered permitting the substitution of Edward J. Kelley, as complainant, the cause of action having been assigned to him, and in the decree there is a finding that Edward J. Kelley is the owner of the claim. It is urged by the defendant that this assignment was error and that the finding of the court in the decree with directions as to what should be done with the money obtained by the lien claimant was erroneous.

During the pendency of this case Kelley, the complainant trustee, died and the administratrix of his estate, Nora G. Hand was substituted as party plaintiff.

The first three points relied upon by the defendant for a reversal of this decree are that the assignment of H. G. Wolff

all work and materials furnished up to March 11, 1924, and as to what work and materials were furnished after March 11, 1924, the record did not show. The court at that time said:

> "The evidence of the witnesses on that subject is too vague to justify a definite finding. Further, there may have been other waivers of lien, similar to that of March 11, 1923, given by Wolff and Company, which, following what we have said above, would prevent a lien for the work and material furnished after March 11, 1924."

The reversal of the decree at that time and the remanding of the cause was for the evident purpose of inquiry as to whether any waiver of liens were given by the H. G. Wolff Company which applied to work and materials furnished subsequent to March 11, 1924. The cause was re-referred to a master and evidence was introduced showing the work and materials subsequently furnished, amounted to $4,092.00.

At the hearing before the master there was produced a witness on behalf of complainant who testified as to the work and materials furnished after March 11, 1924, and who testified as to the material that was delivered and the money that was paid for labor subsequent to that date.

During the hearing before the court an order was entered permitting the substitution of Edward J. Kelley, as complainant, the cause of action having been assigned to him, and in the decree there is a finding that Edward J. Kelley is the owner of the claim. It is urged by the defendant that this assignment was error and that the finding of the court in the decree with directions as to what should be done with the money obtained by the lien claimant was erroneous.

During the pendency of this case Kelley, the complainant trustee, died and the administratrix of his estate, Nora G. Nead was substituted as party plaintiff.

The first three points relied upon by the defendant for a reversal of this decree are that the assignment of H. G. Wolff

Company to Edward J. Kelley, trustee, was not supported by the evidence and, further, that this amendment dates back to the time of the filing of the bill of complaint and, consequently, the evidence should show that Edward J. Kelley, the assignee of the H. G. Wolff Company, furnished the labor and materials in order that the evidence might sustain the amended pleadings.

Section 8 of the Mechanic's Lien Act, Ill. Rev. Bar. Stat. 1933, Chap. 82, par. 8, provides:

> "All liens or claims for lien which may arise or accrue under the terms of this act shall be assignable, and proceedings to enforce such liens or claims for lien may be maintained by and in the name of the assignee, who shall have as full and complete power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimant."

We are of the opinion that the assignee of a claim has the right to be substituted at any state of the proceedings and should proceed with all the rights and privileges of the original plaintiff. Huebner v. Kornaizer, 259 Ill. App. 540; Boyer v. Keller, 258 Ill. 106.

It is further claimed by the defendant that at the hearing only one witness Alvin H. Wolff testified for the complainant for the purpose of showing that additional labor and materials were furnished after March 11, 1934; that one witness was produced by the plaintiff before the master and none by the defendant.

Of the evidence as introduced before the master, some of it was permitted subject to objections and, at the conclusion of the hearing no motion was made by the defendant to exclude the evidence or to ask for a ruling by the master. No particular evidence is pointed out in the objections before the master nor in the exceptions filed before the chancellor, and it cannot be raised in this court for the first time. Counsel should have insisted that the master make a ruling at the time the question was put to the witness and at the time the exhibits were offered and, if adverse

Company to edward d. Bailey, trustee, are not supported by the evidence and, further, that this amendment dates back to the time of the filing of the bill of complaint and, consequently, the evidence should show that Edward d. Bailey, the assignee of the H. C. Gill Company, furnished the labor and materials in order that the evidence might sustain the amended pleadings.

Section 8 of the Mechanic's Lien Act, Ill. Rev. Stat. 1933, Chap. 82, par. 8, provides:

> "All liens or claims for lien which may arise or accrue under the terms of this act shall be enforced and proceedings to enforce such liens or claims for lien may be maintained by and in the name of the assignee, who shall have as full and complete power to enforce the same as if such proceedings were taken under the provisions of this act by and in the name of the lien claimant."

We are of the opinion that the assignee of a claim has the right to be substituted at any stage of the proceedings and should proceed with all the rights and privileges of the original plaintiff. Bingham v. Lorenzen, 291 Ill. App. 342; Meyer v. Keller, 358 Ill. 106.

It is further claimed by the defendant that at the hearing only one witness gave him H. Gill testified for the complainant for the purpose of showing that material labor and materials were furnished after March 11, 1934; that the witness was confused by the plaintiff before the master and none for the defendant.

Of the evidence as introduced before the master, some of it was contradictory subject to objections and, at the conclusion of the hearing no motion was made by the defendant to strike the evidence or to ask for a ruling by the master. No particular evidence is pointed out in the objections before the master nor in the exceptions filed before the commission, nor is it shown or stated in this court for the first time. Counsel should have indicated that the master made a ruling at the time the motion was filed to the witness and at the time the exhibits were offered and, if strong

ruling was had there, to renew the same before the chancellor.

As before stated, no evidence was introduced on behalf of the defendant.

The objections to the master's report should set forth specifically the evidence objected to or the rulings which were prejudicial and the exceptions before the chancellor should also set forth particularly the motions made in relation thereto in order to preserve them for review by this court. Hurd v. Goodrich, 59 Ill. 450; Pennell v. Lamar Insurance Co., 73 Ill. 303. C. & A. R. R. Co. v. Vipond, 112 Ill. App. 558; Village of Grant Park v. Trah, 115 Ill. App. 291; Wright v. Charbonneau, 122 Ill. App. 52.

The next objection is that the master failed to allow $2,500 in bonds which, it is claimed, the contract provided should be accepted by the plaintiff on the last payment. As before stated, this case has been previously before this court and at that time this question could have been and should have been disposed of if the question had been raised before this court. That decision was res judicata upon this appeal and under the practice in this state it cannot raise on second appeals questions which could but have not been raised on the first appeal.

In the case of People of the State of Illinois v. Griesbach, 127 Ill. App. 462, the court said:

> "All questions open to consideration and which could have been presented affecting in any way the legal effect of the signatures in question, whether presented or not, were there settled. Lusk v. The City of Chicago, 211 Ill. 183; C. & E. I. R. R. Co. v. The People, 219 id. 408."

In the case of Newberry, et al. v. Blatchford, et al, 106 Ill. 584, the court said:

> "It is not perceived on what ground complainants may find fault with the decision of the circuit court dismissing their own bill and the cross-bill on behalf of the People of the State. As has been considered, so

ruling was had there, to renew the same before the chancellor.

As before stated, no evidence was introduced on behalf of the defendant.

The objections to the master's report should set forth specifically the evidence objected to or the rulings which were prejudicial and the exceptions before the chancellor should also set forth particularly the exceptions made in relation thereto in order to preserve them for review by this court. Ward v. Lockhart, 30 Ill. 480; Immell v. Lamar Insurance Co., 75 Ill. 303. C. & I. R. R. Co. v. Wright, 112 Ill. App. 320; Village of Mount Pleasant v. Ill. 110 Ill. App. 72; Wright v. Shepherdson, 122 Ill. App. 82.

The next objection is that the master failed to allow $2,500 in bonds which, it is claimed, the contract provided should be accepted by the plaintiff on the last payment. As before stated, this case has been previously before this court and at that time this question could have been and should have been disposed of if the question had been raised before this court. That decision was res judicata upon this record and under the decisions in this state it cannot raise on appeal appeals questions which could but have not been raised on the first appeal.

In the case of People of the State of Illinois v. Wilbrech, 127 Ill. App. 460, the court said:

> "All questions open to consider in an action in which could have been presented effectively in any way the legal effect of the signature in question, whether presented or not, were there settled. Lunn v. The City of Joliet, 91 Ill. 189; C. & A. R. R. Co. v. The People, 14 Id. 334.

In the case of Kochmann, et al. v. Kochmann, et al., 100 Ill. App. the court said:

> "It is not necessary to decide whether an action may lie that will vacate the decision of the circuit court; therefore, their bill and the cross-bill in behalf of the people of the State. We have been considerate, as

> far as they are concerned their rights had been conclusively determined by the Supreme Court on their first appeal. The general doctrine running through all the books on this subject, that when a cause has been once determined by a court of last resort, in a decision covering the merits of the case, the unsuccessful party can not have another hearing on a second appeal as to the same matters, is not questioned by counsel for complainants; but in some way, because the Attorney General, as is now said, was a necessary party to their bill, in order to the efficient protection of the rights of the People of the State in a public and munificent charity, and was not made a party, it is insisted the whole case will again be opened as to all questions made, not only to hear the cause of the People, but as to complainants also. The position taken is assumed by complainants for the first time on this their second appeal. No suggestion was made by either party on the first appeal as to the want of proper parties, either as complainants or defendants."

In Wabash, St. Louis and Pacific Railway Company v. Peterson, 115 Ill. 594, the court said:

> "It has often been decided by this court, that whatever has been decided on one writ of error cannot be re-examined on a subsequent writ of error brought on the same record. Other courts have declared the same doctrine." Chaffin v. Taylor, 116 U. S. 567; Rising v. Carr, 70 Ill. 596; Ogden v. Larrabee, 70 Ill. 510.

From an examination of this record we are satisfied that a preponderance of the proof shows the amount of labor and material furnished subsequent to March 11, 1924, and that no waiver of lien was given by the defendant to the plaintiff subsequent to March 11, 1924, and that the findings of the master and chancellor were correct.

For the reasons stated the decree of the Circuit Court is hereby affirmed.

DECREE AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

far as they are concerned their rights had been conclusively determined by the judgment lodged on their first appeal. The general doctrine running through all the books on this subject, that when a cause has been once determined by a court of law record, in a decision involving the merits of the case, the unsuccessful party can not have another trying on a second appeal to the same matter, is not overcome by counsel for complainants; but in some way, because the attorney General, as he has said, was a necessary party to their bill, he argues to the efficient protection of the rights of the Indians of the State in a public and sufficient charity, and was not made a party, it is insisted the whole case will again be opened as to all questions and not only to that the cause of the Indians, but as to complainants also. The position taken is assumed by complainants for the first time on this their second appeal. No suggestion was made by either party on the first appeal as to the want of proper parties, either as complainants or defendants."

In Kansas, St. Louis and Pacific Railway Company v. Peterson, 118 U.S. 150, the court said:

"It has often been decided by this court, that whatever has been decided on one writ of error cannot be reexamined on a subsequent writ of error brought on the same record. Other courts have declared the same doctrine." Mullen v. Torrey, 118 U. S. 267; Hanna v. Maas, 97 U.S. 306; Lucas v. Brooks, 97 U.S. 112.

From an examination of this record we are satisfied that a preponderance of the proof shows the amount of I but and material furnished subsequent to March 11, 1884, and that no matter of lien was given by the decision of the Circuit Court on appeal to March 11, 1884, and that the finding of the master in chancellor was correct.

For the reasons stated the decree of the Circuit Court is hereby affirmed.

Mr. Justice [illegible].

Mr. [illegible] [illegible], [illegible].

38198

JOSTEN MANUFACTURING CO., a corporation, and E. C. CURTIS, Appellants,	APPEAL FROM MUNICIPAL COURT, OF CHICAGO.
v.	
HARRY E. KEELER, Appellee.	

284 I.A. 646

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Josten Manufacturing Co., from an order entered by the Municipal Court on February 5, 1935, which order vacated a default and judgment in favor of the plaintiff, which judgment was rendered more than thirty days prior to the order vacating the same. This being a fourth class case, there are no formal pleadings required. Summons was served on defendant, returnable December 17, 1934, on which date an order was entered by the court giving the defendants 10 days in which to file an affidavit of defense and the cause was continued until December 31, 1934. On December 28, 1934, the affidavit of defense was filed. On December 31, 1934, a judgment by default was entered for $600 and costs, without disposing of the affidavit of defense then on file. The petition to vacate the judgment filed is in accordance with Paragraph 200 Chapter 110 of the Practice Act, which provides a substitute method and takes the place of a writ of error coram nobis at common law.

There have been some conflicting statements of law in this state as to what facts are necessary to show, which if known to the court at the time, would have precluded the entry of the judgment.

The petition presented in this case sets forth a good defense to the plaintiff's claim.

JOSTEN'S MANUFACTURING CO., a corporation, and K. O. SULLIVAN,

Appellants,

v.

HARRY E. KEELER,

Appellee.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

234 I.A. 646

MR. JUSTICE DAVIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Josten Manufacturing Co., from an order entered by the Municipal Court on February 5, 1936, which order vacated a default and judgment in favor of the plaintiff, which judgment was rendered more than thirty days prior to the order vacating the same. This being a fourth class case, there are no formal pleadings required. Summons was served on defendant, returnable December 17, 1934, on which date an order was entered by the court giving the defendants 10 days in which to file an affidavit of defense and the cause was continued until December 31, 1934. On December 28, 1934, the affidavit of defense was filed. On December 31, 1934, a judgment by default was entered for $800 and costs, without disposing of the affidavit of defense then on file. The petition to vacate the judgment filed is in accordance with Paragraph 390 Chapter 110 of the Statutes Act, which provides a substitute method and takes the place of a writ of error coram nobis at common law.

There have been some conflicting statements of law in this state as to what facts are necessary to show, which if known to the court at the time, would have precluded the entry of the judgment.

The petition presented in this case sets forth a good defense to the plaintiff's claim.

It appears from the facts before us that no notice was given to the defendant of the entry of the judgment.

Rule 34 of the Municipal Court in force at that time, is as follows:

> "No motion will be heard or order made in any case without notice to the opposite party where an appearance of such party has been entered, except when a cause is regularly reached for trial or hearing, either on a date for which it has been set or when assigned from the jury calendar."

It further appears from the facts before us that the clerk of the court had failed to enter on the record kept by the Municipal Court, the fact that on the 28th of December, 1934, the defendant had filed his affidavit of merits and that the court was not aware that such had been done. It has been held in some instances that defendants filing their pleas after the time permitted by statute, is unavailing and may be entirely disregarded. Farmer v. Fowler, 288 Ill. 494.

In the recent case of Jacobson v. Ashkinaze, 337 Ill. 141, the court said:

> "The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law."

And continuing the court said:

> "Beach did not withdraw his appearance as the attorney for the plaintiff in error either by his client's consent or the court's permission. Elliott had no authority to represent the plaintiff in error and the latter had no notice or knowledge of the substitution. To charge the plaintiff in error with notice, actual or constructive, of the ex parte trial, notice, either to Beach the attorney

It appears from the facts before us that no notice was given to the defendant of the entry of the judgment.

Rule 34 of the municipal court in force at that time, is as follows:

> "No motion will be heard or order made in any case without notice to the opposite party where an appearance of such party has been entered, except when a case is regularly reached for trial or hearing, or when a date for which it has been set or when assigned from the jury calendar."

It further appears from the facts before us that the clerk of the court had failed to enter on the record kept by the municipal court, the fact that on the 22th of December, 1934, the defendant had filed his affidavit of merits and that the court was not aware that such had been done. It has been held in some instances that defendants filing their pleas after the time permitted by statute, is unavailing and may be entirely disregarded. Farmer v. Fowler, 238 Ill. 494.

In the recent case of Jackson v. Ashlinger, 327 Ill. 161, the court said:

> "The purpose of the writ coram nobis at common law, and of the statutory motion established for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the minor to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the merits in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law."

And concluding the court said:

> "Jackson did not attribute his ignorance to the attorney for the plaintiff in error either by his client's consent or the court's recommendation. Miller had no authority to represent the plaintiff in error and the latter had no notice or knowledge of the substitution. In order to the plaintiff in error with notice, actual or constructive, of the ex parte trial, notice, either to which the attorney

> or to the plaintiff in error himself, of the motion to vacate the order of October 11, 1920, striking the cause from the docket and to reinstate the cause, was necessary. No such notice was given to either of them. The notice of Elliott of that motion was of no avail because he did not represent the plaintiff in error. These matters of fact did not appear of record and were unknown to the court at the time it reinstated the cause on its docket. Obviously, if these facts had been known the court would not have rendered judgment against a party who had no notice of the reinstatement of the cause and was not chargeable with such notice."

As was said in the case of Swieroz v. Malepka, 259 Ill. App. 262,

> "Under the allegations of defendants' motion which is admitted by the demurrer, the court had no knowledge of the fact that no notice had been given counsel for the defendants. If the court had been apprised of such fact, this would have prevented the entry of default and judgment.
>
> "The order of the circuit court of Cook county vacating the default and giving defendants leave to plead is affirmed."

Certiorari was denied by the Supreme Court.

For the reason that no notice was given to defendant, which fact if known to the court would have prevented the entry of the judgment, we are of the opinion that the order of the Municipal Court vacating the default and giving the defendant leave to be heard upon the merits of the case, should be and hereby is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

or to the plaintiff in error himself, of the motion to vacate the order of dismissal, [illegible], striking the cause from the docket and to reinstate the cause, [illegible] necessary. No such notice was given to either of them. The notice of filing of that motion was of so small consequence as not necessarily the plaintiff in error. These matters of fact did not appear of record and were unknown to the court at the time it reinstated the cause on its docket. Obviously, if these facts had been known the court would not have rendered judgment against a party who had no notice of the prosecution of the cause and was not served with such notice."

In was held in the case of Dalgren v. Atkins, 165 Ill. App. 585,

"Under the allegations of defendants' motion which is admitted by the demurrer, the court had no knowledge of the fact that no notice had been given counsel for the defendants. If the court had been apprised of such fact, this would have prevented the entry of default and judgment.

"The order of the circuit court of Cook County sustaining the defendant's motion, therefore, is error to be reversed is affirmed."

Judgment was reversed by the Supreme Court.

In the present case no notice was given to defendant, which fact if known to the court would have prevented the entry of the judgment. [illegible] the motion [illegible] the order of the Municipal Court vacating the default and giving the defendant leave to be heard upon the merits of the case, should be and hereby is affirmed.

[illegible]

Hall, P.J., and [illegible], J., concur.

38230

GERALD F. GRIFFIN, Appellant, v. ARTHUR QUINN, Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 646

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the defendant and against the plaintiff Gerald F. Griffin in an action of assumpsit to recover for money alleged to have been loaned by the plaintiff to the defendant Arthur Quinn in the sum of $350 at his special instance and request.

The affidavit of defense filed by the defendant states that to the best of his knowledge and belief he at no time had any dealings whatsoever with the said plaintiff; that he is not indebted to plaintiff in the sum of $350 and that he is not acquainted with said plaintiff.

The appearance of the defendant was entered April 12, 1934 and on April 19, 1934, an order was entered extending the time to file the affidavit of merits which was, however, filed on the same date, to-wit: April 19, 1934. Thereafter various orders were issued continuing the case from time to time.

It will not be necessary for us to consider the merits of this controversy as we are met at the outset with a motion for a change of venue and the court's ruling thereon.

On December 17, 1934, notice was served on counsel for defendant that plaintiff would present a petition for a change of venue on December 28, 1934, in which petition plaintiff states that he fears that he will not receive a fair and impartial trial because said judge to whom the case is assigned is prejudiced against him,

92920

GERALD F. GRIFFIN,	
Respondent,	
v.	
ARTHUR QUINN,	
Appellee.	

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

284 I.A. 646

MR. JUSTICE ARNIS E. WILLIAM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the defendant and against the plaintiff Gerald F. Griffin in an action of assumpsit to recover for money alleged to have been loaned by the plaintiff to the defendant Arthur Quinn in the sum of $[illegible] at his special instance and request.

The affidavit of defense filed by the defendant states that to the best of his knowledge and belief he at no time had any dealings whatsoever with the said plaintiff; that he is not indebted to plaintiff in the sum of $[illegible] and that he is not acquainted with said plaintiff.

The appearance of the defendant was entered April 10, 1934 and on April 16, 1934, an order was entered extending the time to file the affidavit of merits which was, however, filed on the same date, to-wit: April 16, 1934. Thereafter various orders were issued continuing the case from time to time.

It will not be necessary for us to consider the merits of this controversy as we are of the opinion that a motion for a change of venue and the court's ruling thereon.

On December 17, 1934, notice was served on counsel for defendant that plaintiff would present a petition for a change of venue on December 28, 1934, in which petition plaintiff states that he fears that he will not receive a fair and impartial trial because said judge to whom the case is assigned is prejudiced against pl.

so that he cannot expect a fair trial and that said prejudice first came to his knowledge on December 17, 1934; that plaintiff prays a change of venue in this cause or for an order that said cause be tried before some other judge. The statute governing a change of venue, Chap. 146, Sec. 6, Ill. State Bar Stats. 1933, reads as follows:

> "6. NOTICE OF APPLICATION.) § 6. No application for a change of venue shall be allowed (more than thirty days after the return day on which the defendant is required to appear) unless the party applying shall have given to the opposite party ten days previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than ten days before the making of the application."

Paragraph 7 of the same chapter reads as follows:

> "7. NO APPLICATION MORE THAN THIRTY DAYS AFTER RETURN DAY ON WHICH DEFENDANT REQUIRED TO APPEAR - EXCEPTIONS.) § 7. No change of venue shall be granted (more than thirty days after the return day on which the defendant is required to appear unless the party applying) shall show that the causes for which the change is asked have arisen or come to his knowledge since the (expiration of such thirty days.)"

Plaintiff alleges that the knowledge of prejudice came to him on December 17, 1934 and the notice required by the statute was given on December 17, 1934 and the application made on December 28, 1934. The plaintiff complied with the statute.

In the case of <u>The People</u> v. <u>Scott</u>, 326 Ill. 327, on page 342, the court said:

> "The decisions of this court have at all times been to the effect that the presiding judge has no right to pass judgment upon the truth of the facts stated in the petition or upon the question whether or not he is, in fact, prejudiced against the petitioner. The statute gives an absolute right to a change of venue to the petitioner when his petition is duly made and verified and filed in accordance with the statute."

The court apparently denied the application because the same had come too late, that is not within thirty days, the time within which the defendant entered his appearance. This would be true excepting that the affidavit stated that the knowledge of the

so that he cannot expect a fair trial and that said prejudice first came to his knowledge on December 17, 1954; that plaintiff says a change of venue in this cause or for an order that said cause be tried before some other judge. The statute governing a change of venue, Chap. 146, Sec. 8, Ill. Bar Stats. 1953, reads as follows:

> "8. NOTICE OF APPLICATION.) § 8. No application for a change of venue shall be allowed (more than thirty days after the return day on which the defendant is required to appear) unless the party applying shall have given to the opposite party ten days previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than ten days before the making of the application."

Paragraph 7 of the same chapter reads as follows:

> "7. NO APPLICATION MORE THAN THIRTY DAYS AFTER RETURN DAY OR WHEN PREJUDICE APPEARS TO ARISEN - EXCEPTIONS.) § 7. No change of venue shall be granted (more than thirty days after the return day on which the defendant is required to appear) unless the party applying shall show that the cause for which the change is asked have arisen or come to his knowledge since the (expiration of such thirty days.)"

It itself alleges that the knowledge of prejudice came to him on December 17, 1954 and the notice required by the statute was given on December 17, 1954 and the application made on December 20, 1954. The plaintiff complies with the statute.

In the case of Illinois v. Scott, 330 Ill. 317, on page 325, the court said:

> "The decisions of this court have at all times been to the effect that the presiding judge has the right to use judgment upon the truth of the facts stated in the petition or upon the question whether or not he is, in fact, prejudiced against the petitioner. The statute gives an absolute right to a change of venue to the petitioner when his petition is duly made and verified and filed in accordance with the statute."

The court apparently denied the application because the same had come too late, that is not within thirty days, the time within which the defendant entered his appearance. This would be true excepting that the affidavit stated that the knowledge of the

prejudice had come to him on the date of the making of the affidavit, to-wit: December 17, 1934, which brings it within the provision of the statute. The petitioner having complied with the statute, was entitled to a change of venue and the trial judge erred in overruling his motion.

For the reasons stated herein, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND HEBEL, J. CONCUR.

prejudice had come to him on the date of the making of the affidavit, to-wit: December 17, 1926, which brings it within the provision of the statute. The petitioner having complied with the statute, was entitled to a change of venue and the trial judge erred in overruling his motion.

For the reasons stated herein, the judgment of the municipal Court is reversed and the cause is remanded for a new trial.

IMMEDIATE ATTACHED AND DUTY ENGROSSED.

HALE, P.J. and MARTIN, J. concur.

38306

THE OAK PARK TRUST AND SAVINGS BANK, as Trustee, under Trust No. 1054,
Appellee,

v.

ATHANASIOS G. SOULIAS and GEORGE S. SIKOKIS,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

284 I.A. 646

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court rendered against the defendants, Athanasios G. Soulias and George Sikokis, and in favor of the plaintiff in a forcible entry and detainer proceeding for possession of the third flat of the building commonly known as 4003 Lawrence Avenue, Chicago, Illinois.

The cause was tried before the court without a jury. The plaintiff, Oak Park Trust and Savings Bank, as trustee, has filed no briefs in this court, but made a motion for the dismissal of defendants' appeal, which was reserved to this hearing.

The abstract of record filed in this court shows that at the hearing in the trial court there was a discussion between the court and counsel regarding a notice, which is not preserved in the abstract, but no witnesses were produced and sworn, no proof offered or heard and the court entered judgment for the plaintiff. In this he was in error.

In order that a judgment be properly entered it must be supported by proof of some kind, the most common type being admissions from pleadings, affidavits, stipulations, testimony of witnesses or documentary proof. There being none such proof presented in this case the judgment of the Municipal Court is hereby reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND HEBEL, J. CONCUR.

38308

THE OAK PARK TRUST AND SAVINGS BANK, as Trustee, under Trust No. 1024, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
ATHANASIOS O. JOULIAS and GEORGE S. SIMONIS, Appellants.	OF CHICAGO.

234 I.A. 646

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court rendered against the defendants, Athanasios O. Joulias and George Simonis, and in favor of the plaintiff in a forcible entry and detainer proceeding for possession of the third flat of the building commonly known as 4022 Lawrence Avenue, Chicago, Illinois.

The cause was tried before the court without a jury. The plaintiff, Oak Park Trust and Savings Bank, as trustee, has filed no brief in this court, but made a motion for the dismissal of defendants' appeal, which was reserved to this hearing.

The abstract of record filed in this court shows that at the hearing in the trial court there was a discussion between the court and counsel regarding a notice, which is not preserved in the abstract, but no witnesses were produced and sworn, no proof offered or heard and the court entered judgment for the plaintiff. In this he was in error.

In order that a judgment be properly entered it must be supported by proof of some kind, the most common type being admissions from pleadings, stipulations, actual sworn testimony of witnesses or documentary proof. There being none such proof presented in this case the judgment of the Municipal Court is hereby reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

BARR, P.J. AND MCKEN, J. CONCUR.

38374

CHICAGO TITLE & TRUST CO., as Trustee, Complainant below in cause General No. B 224484 and A. PARVIN, Complainant below in cause General No. 224302,

v.

AMERICAN TRUST & SAFE DEPOSIT CO., et al.,

Defendants below,

NEW ENGLAND MUTUAL LIFE INSURANCE CO., a Corp., Petitioner below,

Appellant,

v.

CHESTER R. DAVIS as Receiver and MAX L. SATT,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

284 I.A. 647

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Circuit Court of Cook County taken by the New England Mutual Life Insurance Company from part of a final order entered by that court on April 19, 1935, wherein the court found that a reasonable attorney's fee should be allowed to Max L. Satt for $1,750, and ordered the receiver to pay that amount to Satt from the receivership assets. The cause in the trial court was a consolidation of two cases involving the foreclosure of a second mortgage one action being based on a $500 bond, and the other on the entire indebtedness, both of which were secured by the second mortgage, on certain premises located in Chicago, known as 127 North Dearborn street and in that cause an order had been entered on the petition of the New England Mutual Life Insurance Company (the holder of the first mortgage on the premises in question), extending the receivership of Chester R. Davis for its benefit. Both Chester R. Davis, the receiver, and Max L. Satt, his attorney, to whom the allowance was made, are made appellees on this appeal. Satt has filed a cross-appeal, asking for an increase in the amount of fees allowed him.

CHICAGO TITLE & TRUST CO., as Trustee,
Complainant below in cause General
No. 2 324624 and J. DAVIS, Complainant
below in cause General No. 324328,

v.

AMERICAN TRUST & SAVE DEPOSIT CO., et al.,

Defendants below,

NEW ENGLAND MUTUAL LIFE INSURANCE CO., a
Corp., Petitioner below,

Appellant,

v.

CHESTER R. DAVIS as Receiver and MAX L.
SAYT,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

2 34 I.A. 647

MR. JUSTICE DENIS E. SHULMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Circuit Court of Cook County taken by the New England Mutual Life Insurance Company from part of a final order entered by that court on April 19, 1933, wherein the court found that a reasonable attorney's fee should be allowed to Max L. Sayt for $1,750, and ordered the receiver to pay that amount to Sayt from the receivership assets. The suits in the trial court are a consolidation of two cases involving the foreclosure of a second mortgage one action being based on a $500 bond, and the other on the entire indebtedness, both of which were secured by the second mortgage, on certain premises located in Quincy, known as 127 North Dearborn Street and in that cause an order has been entered on the petition of the New England Mutual Life Insurance Company (the holder of the first mortgage on the premises in question), extending the receivership of Chester R. Davis for its benefit. Both Chester R. Davis, the receiver, and Max L. Sayt, his attorney, to whom the allowance was made, are made appellees on this appeal. Sayt has filed a cross-appeal, asking for an increase in the amount of fees allowed him.

The receiver was appointed July 31, 1931 on the application of A. Parvin, in a suit to foreclose on a $500 bond secured by a second mortgage. On August 3, 1931, an order was entered extending the benefit of the receivership of Chester R. Davis to Cause No. B-224484, entitled Chicago Title and Trust Company as Trustee v. American Trust and Safe Deposit Company, which was a suit brought to foreclose a $1,000,000 bond issue secured by a first mortgage.

On December 16, 1932, the said receivership of Chester R. Davis was extended for the benefit of the said New England Mutual Life Insurance Company and it was ordered that its attorneys be given notice of all motions, petitions and orders sought by Chester R. Davis, as receiver, or his attorney, concerning the receivership.

Davis, as receiver, and Satt, as his attorney, continued acting in their respective capacities until March 15, 1935, when an order was entered giving solicitor for receiver leave to file a statement of services and setting the hearing on the receiver's current report, which was the sixth report, for March 23, 1935, and entering a rule on all parties to file objections by March 21, 1935.

Objections were filed by the attorneys for the New England Mutual Life Insurance Company to the fees of $6,000 claimed by Chester R. Davis, receiver, as requested by him in his sixth current report and account and $4,700 claimed by Max L. Satt, his attorney, being the amount suggested by Max L. Satt as a reasonable fee to himself.

On March 23, 1935, after a hearing, the trial court entered an order approving the receiver's sixth current account and report, and ordering the receiver to pay to the New England Mutual Life Insurance Company the sum of $22,000 to apply on the deficiency entered in its favor in cause No. B-260431, and further ordering the receiver to pay to Max L. Satt $750 on account of fees, to be without prejudice to the objection of New England Mutual Life Insurance

The receiver was appointed July 31, 1931 on the application of A. Ravin, in a suit to foreclose on a $500 bond secured by a second mortgage. On August 3, 1931, an order was entered extending the benefit of the receivership of Chester R. Davis to Cause No. B-324484, entitled Chicago Title and Trust Company as Trustee v. American Trust and Safe Deposit Company, which was a suit brought to foreclose a $1,000,000 bond issue secured by a first mortgage.

On December 10, 1932, the said receivership of Chester R. Davis was extended for the benefit of the said New England Mutual Life Insurance Company and it was ordered that its attorneys be given notice of all motions, petitions and orders sought by Chester R. Davis, as receiver, or his attorney, concerning the receivership.

Davis, as receiver, and suit, as his attorney, continued acting in their respective capacities until March 10, 1933, when an order was entered giving solicitor for receiver leave to file a statement of services and setting the hearing on the receiver's current report, which was the sixth report, for March 21, 1933, and entering a rule on all parties to file objections by March 31, 1933.

Objections were filed by the attorneys for the New England Mutual Life Insurance Company to the fees of $2,000 claimed by Chester R. Davis, receiver, as recommended by him in his sixth current report and account and $4,700 claimed by Max L. Suit, his attorney, being the amount suggested by Max L. Suit as a reasonable fee to himself.

On March 22, 1933, after a hearing, the trial court entered an order approving the receiver's sixth current account and report, and ordering the receiver to pay to the New England Mutual Life Insurance Company the sum of $2[illegible],000 to apply on the deficiency entered in its favor in cause No. B-324484, and further ordering the receiver to pay to Max L. Suit $750 on account of fees, to be without prejudice to the objection of New England Mutual Life Insurance

Company to the attorney's fees requested by said receiver and said Satt, setting the hearing on the fees for April 10, 1935.

On said last date Satt, as attorney for the receiver, filed a petition for his fees in which he sets forth the extension of the receivership and states that said receiver has filed two current reports and accounts since July 31, 1931; that he was allowed the sum of $3,000 as solicitor's fees for services to said receiver upon account during the period covered by said current report and that on his second report and account he had been allowed $2,000 as and for solicitor's fees for services to the receiver and that he now presents the receivers third current report and account since said extension, which account covers the period from January 5, 1934, up to and including February 11, 1935; that said report shows receipts by the receiver amounting to $102,808.13 and that a reasonable fee for his services as solicitor for receiver would be the sum of $4,500 and sets forth in detail the services rendered during said period to the said Chester R. Davis, as receiver. Apparently the objections to the fees of the receiver Chester R. Davis have been withdrawn or abandoned as nothing is said about them in this court.

The hearing on the receiver's report and accounting and on the fees of the said receiver and also on those of his attorney commenced on March 23, 1935 before Judge John Prystalski and, at the conclusion of such hearing, on April 12, 1935, an order was entered approving the receiver's sixth current account and report and fixing the compensation of the receiver at the sum of $5,100 and the compensation of Mr. Satt, his attorney, at $1,750, which amount includes the $750 theretofore allowed the receiver's attorney, and directing that the receiver pay to Mr. Satt the balance of $1,000.

Company to the attorney's fees requested by said receiver and said Batt, setting the hearing on the fees for April 10, 1933.

On said last date Batt, as attorney for the receiver, filed a petition for his fees in which he sets forth the extension of the receivership and states that said receiver has filed two current reports and accounts since July 31, 1931; that he was allowed the sum of $2,000 as solicitor's fees for services to said receiver upon account during the period covered by said current report and that on his second report and account he had been allowed $2,000 as and for solicitor's fees for services to the receiver and that he now presents the receiver's third current report and account since said extension, which account covers the period from January 6, 1934, up to and including February 11, 1933; that said report shows receipts by the receiver amounting to $102,808.13 and that a reasonable fee for his services as solicitor for receiver would be the sum of $4,800 and sets forth in detail the services rendered during said period to the said Dwaster V. Davis, as receiver. Apparently the objections to the fees of the receiver Dwaster V. Davis have been withdrawn or abandoned as nothing is said about them in this court.

The hearing on the receiver's report and accounting and on the fees of the said receiver and also on those of his attorney commenced on March 26, 1933 before Judge John Partridge and, at the conclusion of said hearing, on April 13, 1933, an order was entered approving the receiver's sixth current account and report and fixing the compensation of the receiver at the sum of $2,100 and the compensation of Mr. Batt, his attorney, at $1,750, which amount includes the $750 heretofore allowed the receiver's attorney, and directing that the receiver pay to Mr. Batt the balance of $1,000.

From a review of the record it appears that the position taken by the New England Mutual Life Insurance Company is that $5,000 is ample compensation for the work which Satt, the solicitor, performed for the receiver from January 16, 1932, down to the present, and that the allowance of $1,750 was in excess of what he had earned and to which he was entitled. In the record that was preserved, it shows that evidence was heard only on the services that were performed from January 5, 1934 up to and including February 11, 1935.

The order that was entered on the 19th day of April, 1935, at the conclusion of the hearing, recited:

> "IT IS THEREFORE FURTHER ORDERED that said allowance be and it is hereby declared to be in full for services rendered by said Satt."

Satt had been the attorney for the receiver from July 31, 1931, and it is contended by the insurance company that the amount he had heretofore been paid on account, to-wit, $5,000 was sufficient compensation for all the work which he had done between the dates of July 31, 1931 and April 19, 1935. There is nothing in the record before us to show what services were performed for the receiver by Satt prior to January 5, 1934, so that we are unable to answer that question and to determine as to whether or not the contention of the insurance company that up to the date of the inquiry he had already been paid in full for all of his services.

When a case is appealed to the Appellate Court, the evidence must be preserved in full in order that this court may review the same, otherwise it will be presumed that the trial court found the facts correctly. Haagen v. Globe Printing Co., 128 Ill. App. 307.

In this case the record shows that no evidence was introduced as to what was the usual and customary fee for services of the character performed by Satt and the cause was heard by the court solely because of the unreasonable fee. No contention was made in

From a review of the record it appears that the position taken by the New England Mutual Life Insurance Company is that $5,000 is ample compensation for the work which Mark, the solicitor, performed for the receiver from January 16, 1932, down to the present, and that the allowance of $1,750 was in excess of what he had earned and to which he was entitled. In the record that was preserved, it shows that evidence was heard only on the services that were performed from January 3, 1934 up to and including February 11, 1932.

The order that was entered on the 19th day of April, 1932, at the conclusion of the hearing, recited:

> "IT IS THEREFORE THAT THE COMPANY that said allowance be and it is hereby declared to be in full for services rendered by said Mark."

Mark had been the attorney for the receiver from July 31, 1931, and it is contended by the insurance company that the amount he had heretofore been paid on account, to-wit, $5,000 was sufficient compensation for all the work which he had done between the dates of July 31, 1931 and April 19, 1932. There is nothing in the record before us to show what services were performed for the receiver by Mark prior to January 3, 1934, so that we are unable to answer that question and to determine as to whether or not the contention of the insurance company that up to the date of our inquiry he had already been paid in full for all of his services.

When a case is appealed to the appellate court, the evidence must be preserved in full in order that this court may review the same, otherwise it will be presumed that the trial court found the facts correctly. Keenan v. Globe Printing Co., 158 Ill. App. 307.

In this case the record shows that no evidence was introduced as to what was the usual and customary fee for services of the character performed by Mark and the court was being by the court solely because of the unreasonable fee. No contention was made in

the trial court that Davis, the receiver, because of the fact that he was a lawyer should have performed his own legal services. That question is raised here for the first time and such a defense not having been raised in the trial court, cannot now be considered by the Appellate Court in reviewing the record. City of Mattoon v. Noyes, 218 Ill. 594.

As before stated the fixing of fees is within the discretion of the trial court and the rule of law governing such cases is that the trial court take into consideration its personal knowledge of the general nature and character of the services alleged to have been rendered and, as was said in the case of Culver v. Allen Medical Assn., 206 Ill. 40;

> "The rule of law governing this case is, that in the absence of legislation regulating the compensation of a receiver, the court in which a receiver is appointed has the right to determine the amount that shall be paid to him for his services; that the court, in fixing a receiver's compensation, may, in connection with the evidence before it, take into consideration its personal knowledge of the general nature and character and value of the services alleged to have been rendered, and that a court of review will ordinarily defer much to the judgment of the court that made the appointment, and will not disturb its action in fixing a receiver's compensation unless the decree is manifestly wrong."

The property involved here is a sixteen story building located at 127 North Dearborn street and leased out to various tenants.

It is the contention of the plaintiff that the allowance of $1,750 by the trial court was an unreasonable fee. No suggestion is made or evidence introduced as before stated as to what would be a reasonable fee, excepting the statement that $5,000 theretofore received by Batt was sufficient to pay for the work that he had theretofore done, as well as the work involved here. There is nothing in the record to support counsel's statement in this regard.

We fully agree with the contention of counsel for plaintiff that the court should not allow fees in excess of the amount that is earned by either the receiver or his counsel and that the court should

the trial court that Davis, the receiver, because of the fact that he was a lawyer should have performed his own legal services. That question is raised here for the first time and such a defense not having been raised in the trial court, cannot now be considered by the appellate court in reviewing the record. City of Mattoon v. Moore, 218 Ill. 664.

We before stated the fixing of fees is within the discretion of the trial court and the rule of law governing such cases is that the trial court take into consideration its personal knowledge of the general nature and character of the services alleged to have been rendered and, as was said in the case of Dwyer v. Allen Medical Assn., 306 Ill. 40:

> "The rule of law governing this case is, that in the absence of legislation regulating the compensation of a receiver, the court in which a receiver is appointed has the right to determine the amount that shall be paid to him for his services; that the court, in fixing a receiver's compensation, may, in connection with the evidence before it, take into consideration its personal knowledge of the general nature and character and value of the services alleged to have been rendered, and that a court of review will ordinarily defer much to the judgment of the court that made the appointment, and will not disturb its action in fixing a receiver's compensation unless the decree is manifestly wrong."

The property involved here is a sixteen story building located at 127 North Dearborn street and leased out to various tenants.

It is the contention of the plaintiff that the allowance of $1,750 by the trial court was an unreasonable fee. No suggestion is made by evidence introduced in behalf of the defendant as to what would be a reasonable fee, admitting the statement that $5,000 therefore received by Davis was sufficient to pay for the work if it had been therefore done, as well as the work involved here. There is nothing in the record to support counsel's statement in this regard.

We fully agree with the contention of counsel for plaintiff that the court should not allow fees in excess of the amount that is earned by either the receiver or his counsel and that the court should

be diligent to correct any claims of excessive fees, so as to prevent injustice in this regard.

What we have said about errors assigned by the appellant, applies with equal force to the cross-errors assigned by the appellees. No evidence is preserved in the record by him showing what are reasonable fees for the services that Satt performed and, apparently, the matter was left solely to the trial judge to use his own discretion based on his knowledge of what such services were worth.

With the meager information that is before us regarding the services rendered, we cannot say that the trial court was either arbitrary or unreasonable and we are of the opinion that he had no proper basis upon which to fix the fees at a different figure than that determined by him.

For the reasons herein given, the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND MEBEL, J. CONCUR.

be diligent to correct any claims of excessive fees, so as to prevent injustice in this regard.

What we have said about errors assigned by the appellant, applies with equal force to the cross-errors assigned by the appellees. No evidence is preserved in the record by him showing what are reasonable fees for the services that he performed and, apparently, the matter was left solely to the trial judge to use his own discretion based on his knowledge of what such services were worth.

With the meager information that is before us regarding the services rendered, we cannot say that the trial court was either arbitrary or unreasonable and we are of the opinion that he had no proper basis upon which to fix the fees at a different figure than that determined by him.

For the reasons herein given, the order of the circuit court is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND MORAN, J. CONCUR.

38408

EDNA DEAN DUVALL,

Appellant,

v.

THE CHICAGO TRUST COMPANY, a corporation, and DAYTON KEITH,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

284 I.A. 647

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court overruling the exceptions to the report of the master in chancery filed in said cause and dismissing the bill of complaint for want of equity.

The bill of complaint charges that the defendants, The Chicago Trust Company, a corporation, and Dayton Keith sold to plaintiff bonds which have since depreciated in value; that the defendant Dayton Keith is the husband of a first cousin of the plaintiff; that a highly confidential relationship existed between plaintiff and defendant Keith and that he was in the position of a fiduciary toward the plaintiff; that the securities were purchased by Keith for the plaintiff from The Chicago Trust Company and were not suitable for investments of the funds of the plaintiff, but were inadequately secured and that all the bonds at the time of the filing of the bill with the exception of the Rainbow Park Apartment bonds were in default and of little or no value and that the defendant Dayton Keith breached his duty as a fiduciary by reason of the purchase of these securities from the concern for whom he was then acting as manager and that this was done with full knowledge of The Chicago Trust Company.

The answer of the defendant The Chicago Trust Company denies the allegations of the bill of complaint and claims the

38406

ZONA DEAN DUVALL,

Appellant,

v.

THE CHICAGO TRUST COMPANY, a corporation, and DAYTON KEITH,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

264 I.A. 647

MR. JUSTICE EDWIN S. MULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court overruling the exceptions to the report of the master in chancery filed in said cause and dismissing the bill of complaint for want of equity.

The bill of complaint charges that the defendants, The Chicago Trust Company, a corporation, and Dayton Keith sold to plaintiff bonds which have since depreciated in value; that the defendant Dayton Keith is the husband of a first cousin of the plaintiff; that a highly confidential relationship existed between plaintiff and defendant Keith and that he was in the position of a fiduciary toward the plaintiff; that the securities were purchased by Keith for the plaintiff from The Chicago Trust Company and were not suitable for investments of the funds of the plaintiff, but were inadequately secured and that all the bonds at the time of the filing of the bill with the exception of the Rainbow Park Apartment bonds were in default and of little or no value; that the defendant Dayton Keith breached his duty as a fiduciary by reason of the purchase of these securities from the concern for whom he was then acting as manager and that this was done with full knowledge of The Chicago Trust Company.

The answer of the defendant The Chicago Trust Company denies the allegations of the bill of complaint and claims the

benefit of the five year statute of limitations, charges laches on the part of the plaintiff and denies that she is entitled to any relief.

The defendant Keith answering admits that he is the husband of a first cousin of the plaintiff and that he was acquainted with the family and that in 1935 he was the manager of the Real Estate Loan Department of The Chicago Trust Company; that The Chicago Trust Company made loans and sold bonds to its customers but denies that the defendant ever acted as agent of the plaintiff; alleges that the securities described were purchased from The Chicago Trust Company when the defendant was then its agent and that the sale of the securities was handled in the usual manner by The Chicago Trust Company; denies that a fiduciary relation existed between the plaintiff and himself and denies the purchase of any securities from him for the plaintiff; denies any breach of trust; denies that the securities were not suitable for investment; denies there was any duty owing from him to plaintiff of a fiduciary nature; avers that the plaintiff had a full knowledge of the securities at the time of the purchase.

The cause was referred to a master in chancery who heard the evidence and reported the same with a recommendation.

There is not much, if any, dispute as to the facts which in substance are as follows:

Edna Dean Proctor inherited from her grandfather and grandmother some $30,000 and that her mother became her legal guardian; that her father had been in the lumber business in the City of Peoria, Illinois, and that after his death in 1906, one David S. Lee, a brother-in-law of the plaintiff's mother, assumed control of the lumber business. Plaintiff's mother testified that she frequently consulted

benefit of the five year statute of limitations, charges laches on the part of the plaintiff and denies that she is entitled to any relief.

The defendant Keith answering admits that he is the husband of a first cousin of the plaintiff and that he was acquainted with the family and that in 1928 he was the manager of the Real Estate Loan Department of The Chicago Trust Company; that The Chicago Trust Company made loans and sold bonds to its customers but denies that the defendant ever acted as agent of the plaintiff; alleges that the securities described were purchased from The Chicago Trust Company when the defendant was then its agent and that the sale of the securities was handled in the usual manner by The Chicago Trust Company; denies that a fiduciary relation existed between the plaintiff and himself and denies the purchase of any securities from him for the plaintiff; denies any breach of trust; denies that the securities were not suitable for investment; denies there was any duty owing from him to plaintiff of a fiduciary nature; avers that the plaintiff had a full knowledge of the securities at the time of the purchase.

The cause was referred to a master in chancery who heard the evidence and reported the same with a recommendation.

There is not much, if any, dispute as to the facts which in substance are as follows:

Ethel Dean Foster inherited from her grandfather and grandmother some $30,000 and that her mother became her legal guardian; that her father had been in the lumber business in the city of Peoria, Illinois, and that after his death in 1908, one David L. Dean, a brother-in-law of the plaintiff's mother, assumed control of the lumber business. Plaintiff's mother testified that she frequently consulted

with the defendant Dayton Keith about matters of business after his connection with The Chicago Trust Company, he being the son-in-law of David S. Lee who died in 1927. It seems that after plaintiff obtained her majority her mother continued to supervise her investments,

It is contended that in 1925, plaintiff's funds were invested in farm mortgages and that David S. Lee advised plaintiff and her mother with reference to the investment of their funds and that he advised them at that time to discontinue making investments in farm mortgages and to invest in loans on improved city real estate; that Keith was consulted by the mother of plaintiff and the said David S. Lee and he advised them th t he had implicit confidence in The Chicago Trust Company and the securities issued by it and that pursuant thereto Emma K. Proctor purchased bonds for the account of her daughter. As heretofore stated David S. Lee died in 1927 and Dayton Keith became a director of the Lumber Company and was designated as Secretary thereof; that between the years 1925 and 1931 there existed a very friendly relationship between the plaintiff, her mother and the defendant Keith.

It is further contended that Mrs. Proctor was a woman of more than average intelligence and had had some business experience; that between the years 1925 and 1927, plaintiff and her mother reposed implicit confidence in said David S. Lee, the brother-in-law of the mother and that certain of the securities were purchased during his lifetime with his approval.

The master found that Keith recommended the purchase of real estate bonds and that the plaintiff and her mother knew they were purchasing these bonds from The Chicago Trust Company; that they knew of the connection of Keith with The Chicago Trust Company; that they knew he was not acting as a salesman and that with every

with the defendant Dryden Keith about matters of business after his connection with The Chicago Trust Company, he being the son-in-law of David S. Lee who died in 1927. It seems that after plaintiff obtained her majority her mother continued to supervise her investments.

It is conceded that in 1928, plaintiff's funds were invested in farm mortgages and that David S. Lee advised plaintiff and her mother with reference to the investment of their funds and that he advised them at that time to discontinue making investments in farm mortgages and to invest in loans on improved city real estate; that faith was reposited by the mother of plaintiff and the said David S. Lee and he advised them it is his implicit confidence in The Chicago Trust Company and the securities issued by it and that pursuant thereto Exhs. 2, Proctor introduced bonds for the account of her daughter. In September there 2 and 3. Lee died in 1927 and Dryden Keith became a director of the lumber company and was designated as secretary thereof; that between the years 1928 and 1931 there existed a very friendly relationship between the plaintiff, her mother and the defendant Keith.

It is further contended that Proctor was a woman of more than average intelligence and had had some business experience; that between the years 1928 and 1927, plaintiff and her mother reposed implicit confidence in said David S. Lee, the brother-in-law of the mother and that certain of the securities were purchased during his lifetime with his approval.

The master found that Keith recommended the purchase of real estate bonds and that the plaintiff and her mother knew they were purchasing these bonds from The Chicago Trust Company; that they knew of the connection of Keith with The Chicago Trust Company; that they knew he was not acting as a salesman and that with every

recommendation made by Keith a circular was enclosed concerning the property which secured the bonds; that the fact that Mrs. Proctor and the plaintiff chose to repose confidence in Keith and his recommendations rather than make a personal examination of the security did not create a fiduciary relation between herself and Keith, which was none other than that of purchaser and seller; that Keith did not act in a dual capacity and that the defendant acted in good faith; that the plaintiff is not entitled to rescind her purchase and that plaintiff failed to exercise due diligence and that plaintiff deposited her bonds with various bondholders committees and thereby forfeited any right she might have had, but that no such right ever existed and the master recommends that a decree be entered dismissing the bill for want of equity.

It further appears that at no time did the defendant Keith receive any compensation for services in connection with the investments of plaintiff's funds.

The bill of complaint was filed June 20, 1933, and the transactions between these parties commenced in October, 1925.

The first question to be determined is whether or not a fiduciary relation existed between Keith, the defendant, and plaintiff by reason of the relationship between them.

In the case of Bishop v. Hilliard, 227 Ill. 382, the court at page 386, said:

> * * * * we have failed to find any evidence which convinces us that they tried to induce her, against her will, to make the deed, and we are at a loss to perceive upon what theory a fiduciary relation between the parties can be said to exist. Nothing more than the ordinary and usual family relations seems to have existed between the parties during the time the mother resided with the daughter. A fiduciary relation which brings the parties within the rule contended for by counsel for the appellant is one growing out of the relation of administrator and heir, guardian and ward, attorney and

recommendation made by Keith a director was enclosed concerning the property which secured the bonds; that the fact that Mrs. Crocker and the plaintiff chose to repose confidence in Keith and his recommendations rather than make a personal examination of the security did not create a fiduciary relation between herself and Keith, which was more other than that of mortgagor and mortgagee; that Keith did not act in a dual capacity and that the defendant acted in good faith; that the plaintiff is not entitled to rescind her purchase and that plaintiff failed to exercise due diligence and that plaintiff dependent her bonds with various bondholders committees and thereby forfeited any right she might have had, but that no such right ever existed and the master recommends that a decree be entered dismissing the bill for want of equity.

It further appears that at no time did the defendant Keith receive any compensation for services in connection with the investments of plaintiff's funds.

The bill of complaint was filed June 28, 1927, and the transactions between these parties commenced in October, 1922.

The first question to be determined is whether or not a fiduciary relation existed between Keith, the defendant, and plaintiff by reason of the relationship between them.

In the case of Jackson v. Whitford, 247 Ill. 292, the court at page 306, said:

> " " " we have failed to find any evidence which convinces us that they tried to induce her, against her will, to make the deed, and we are at a loss to perceive upon what theory a fiduciary relation between the parties can be said to exist. Nothing more than the ordinary and usual family relations seems to have existed between the parties during the time the mother resided with the daughter. A fiduciary relation which brings the parties within the rule contended for by counsel for the appellant in one growing out of the relation of administrator and heir, guardian and ward, attorney and

client, principal and agent, - in other words, where the business of one is entrusted to another in such a way as to render the principal liable to be imposed upon by the agent. It is sometimes defined to be 'that relation existing between parties where one holds the character of a trustee or a character analogous thereto, such as an agent, guardian and the like, and the person stands in such a position that he has rights and powers which he is bound to exercise for the benefit of the other person.' (13 Am. & Eng. Ency. of Law, - 2d. - 10.) Even though a fiduciary relation might exist, transactions between the parties are deemed to be valid if it is made to appear that they were entered into with full knowledge of their nature and effect, and they were the result of the deliberate, voluntary and intelligent desire of the parties, and were not consummated by the exercise of the influence engendered as the result of the relation existing between the parties. (Kellogg v. Peddicord, 181 Ill. 22.)"

In this case a review of the evidence shows that the defendant Keith openly and fairly explained the kind of bonds that he was offering for sale and also the method by which the bank maintained the market; that the bank was then in the habit of buying back bonds less one per cent and that Keith had purchased some himself and that in his opinion they were a good investment. The fact that by subsequent decisions it has been determined to be unlawful for banks to agree to repurchase bonds at a stated price would not be chargeable against defendant. There was no deception practiced and no advantage gained to Keith or to the bank which could not have been had by selling the bonds to someone else. Keith was merely the agent in the bank's employ in selling the bonds.

We have not the slightest doubt that if the world wide depression had not enveloped us since 1929, with the consequent depreciation in values of all securities, no charges of bad faith such as this and similar ones could or would be made. As our Supreme Court said in the case of The People v. Johnson, 355 Ill. 380, at page 389:

> client, principal and agent, - in other words, where the business of one is entrusted to another in such a way as to render the principal liable to be impeached upon by the agent. It is sometimes defined to be 'that relation existing between parties where one holds the character of a trustee or a character analogous thereto, such as an agent, guardian and the like, and the person stands in such a position that he has rights and powers which he is bound to exercise for the benefit of the other person.' (12 Am. & Eng. Ency. of Law, - 2d. - 12.) Even though a fiduciary relation might exist, transactions between the parties are deemed to be valid if it is made to appear that they were entered into with full knowledge of their nature and effect, and they were the result of the deliberate, voluntary and intelligent desire of the parties, and were not consummated by the exercise of the influence engendered on the result of the relation existing between the parties. (Kellogg v. Hodgkins, 181 Ill. 7.)"

In this case a review of the evidence shows that the defendant dealth openly and fairly explained the kind of bonds that he was offering for sale and also the method by which the bank maintained the market; that the bank was then in the habit of buying back bonds less one per cent and to which had already had some himself and that in the opinion they were a good investment. The fact that by subsequent decisions it has been determined to be unlawful for banks to issue to mortgage bonds as a related notes would not be chargeable against defendant. There was no deception practised and no advantage taken in dealing or to the bank which could not have been had by dealing the bonds to someone else. Dealth was merely the event in the bank's anxiety to sell the bonds.

We have not the slightest doubt that if the world wide depression had not developed in since 1929, with the consequent depreciation in values of all securities, no question of the firm such as this and similar ones could or would be made. As our Supreme Court said in the case of The People v. Johnson, 338 Ill. 380, at page 384:

> "The court has the right to take into consideration current history. The court is not unmindful of the financial cataclysm which rocked the nation in the fall of 1929. A large number of corporations of far greater magnitude and occupying high financial positions have fallen to destruction since the fall of 1929. The fact that the Fairfax Company met with financial difficulties in 1930 does not prove its financial condition or the value or condition of its securities in either July or September, 1929."

In the instant case doubtless the value of securities purchased at that time depreciated as did all other securities, but that does not prove that the defendants did not honestly believe at the time these securities were sold to the plaintiff that they were worth the amount for which they were sold.

For the reasons herein given the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

"The court has the right to take into consideration current history. The court is not unmindful of the financial catastrophe which rocked the nation in the fall of 1929. A large number of corporations of far greater magnitude and commanding high financial positions have fallen to destruction since the fall of 1929. The fact that the Pantex Company was with financial difficulties in 1930 does not prove its financial condition or the value or condition of its securities in either July or September, 1929."

In the instant case Substituting the value of securities purchased at that time depreciated as did all other securities, but that does not prove that the defendants did not honestly believe at the time these securities were sold to the plaintiff that they were worth the amount for which they were sold.

For the reasons herein given the judgment of the Circuit Court is affirmed.

AFFIRMED.

HALE, P.J. AND FRUTI, J. DISSENT.

38434

CITY OF CHICAGO, a municipal corporation,
(Plaintiff) Appellee,

v.

INTERNATIONAL REGISTER COMPANY, a corporation,
(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

284 I.A. 647

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court finding the defendant guilty of operating a machine shop in the City of Chicago without having obtained a license in violation of Section 3834 - A of the Revised Chicago Code of 1931. An appeal was taken to the Supreme Court with a certificate of importance from the trial judge on the ground that the validity of a municipal ordinance was involved, which was transferred by the Supreme Court to this court. See City of Chicago v. International Register Company, 360 Ill. 602. No additional briefs or arguments were filed in this court. Sections 3834A, 3834B and 3834C of the ordinance involved, read as follows:

"3834A. DEFINITION - LICENSE REQUIRED.) A machine shop is hereby defined to be a workshop in which machines are made or metal parts thereof are repaired, or where parts of machines, or tools, implements, gears, dies, screws or other metal articles are cut, filed, shaped or repaired by means of a lathe or other machinery. No person, firm or corporation shall conduct, operate or manage a machine shop within the limits of the City of Chicago without having first obtained a license therefor, provided, however, that this shall not apply to any class of machine shops specifically licensed under other ordinances of the City of Chicago.

3834B. APPLICATION FOR LICENSE.) Any person, firm or corporation now operating or that may hereafter desire to operate a machine shop as defined in Section 3834A of this ordinance and required to be licensed thereunder shall make application in writing to the City Collector for a license therefor. Such application shall conform to the general provisions of this ordinance relating to applications for licenses.

3834C. INVESTIGATION.) It shall be the duty of the commissioner of health, the commissioner of buildings and the chief fire prevention engineer to make separate investigations in order to determine whether the building or place within which such machine shop is conducted or is to

38434

CITY OF CHICAGO, a municipal corporation,
(Plaintiff) Appellee,

v.

INTERNATIONAL MACHINE COMPANY, a corporation,
(Defendant) Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

284 I.A. 647

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court finding the defendant guilty of operating a machine shop in the city of Chicago without having obtained a license in violation of Section 38434 - A of the Revised Chicago Code of 1931. An appeal was taken to the Supreme Court with a certificate of importance from the trial judge on the ground that the validity of a municipal ordinance was involved, which was transferred by the Supreme Court to this court. See City of Chicago v. International Harvester Company, 350 Ill. 602. No additional briefs or abstracts were filed in this court. Sections 38434 and 38434B of the ordinance involved, read as follows:

38434A. DEFINITION - LICENSE REQUIRED.) A machine shop is hereby defined to be a workshop in which machines are made or metal parts thereof are repaired, or where parts of machines, or tools, implements, gears, dies, screws or other metal articles are cut, filed, ground or repaired by means of a lathe or other machinery. No person, firm or corporation shall conduct, operate or manage a machine shop within the limits of the City of Chicago without having first obtained a license therefor, provided, however, that this shall not apply to any class of machine shops specifically licensed under other ordinances of the City of Chicago.

38434B. [illegible] - FEE.) Any person, firm or corporation now operating or that may hereafter desire to operate a machine shop as defined in section 38434A of this ordinance and required to be licensed hereunder, shall make application in writing to the City Collector for a license therefor. Such application shall conform to the general provisions of this ordinance relating to application for licenses.

38434C. INVESTIGATION.) It shall be the duty of the commissioner of health, the commissioner of building and the chief fire prevention engineer to make separate investigations in order to determine whether the building or place within which such machine shop is conducted or is to

be conducted complies with all the provisions of the city ordinances relating to health, safety, sanitation, building and fire prevention, respectively, and each of said officers shall make a separate report thereon to the mayor of the results of such investigation. If such reports shall show that the applicant has complied with all the ordinances of the city of Chicago relating to the business so conducted or to be conducted and relating to the premises for same, and that such business is or will be conducted in conformity with the laws of the state of Illinois, the mayor shall, upon the payment of the license fee herein provided for to the city collector, cause a license to be issued to such applicant authorizing the applicant to conduct such machine shop."

Then follows the amount of annual fees to be paid for such license, the sanitary requirements, provisions as to location and prohibiting the operation in the night time in a neighborhood that is used for residential purposes. Then follows the provision for inspection and the penalty of not less than $10 nor more than $100 for violation of the ordinance.

On the trial it appears that the defendant had not obtained a license and that it had violated the provisions of the ordinance according to its terms ~~xxxxxxxxxxxxxxxxxxxx~~ and according to the definition of what constitutes a machine shop under said ordinance.

Defendant further answers the charge of the plaintiff alleging that it had no right under the law to pass this kind of an ordinance which would include the business of the defendant. This at once brings us to the consideration of the question as to whether or not the city has the power under its charter to pass this ordinance, which is the basis of this appeal.

Chapter 110, Par. 203, Sec. 75 Ill. State Bar Stats. 1935, provides as follows:

"Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested as a party or otherwise."

In deciding this case, City of Chicago v. International

be conducted consistent with all the provisions of the city ordinances relative to health, safety, sanitation, building and fire prevention, respectively, and each of said officers shall make a separate report thereon to the mayor of the results of such investigation. If such reports shall show that the applicant has complied with all the ordinances of the city as relating to the business to be conducted or to be conducted and for which to the premises for same, and that such business is to will be conducted in conformity with the laws of the state of Illinois, the mayor shall, upon the payment of the license fee herein provided for to the city collector, cause a license to be issued to such applicant authorizing the applicant to conduct such business.

Then follows the amount of annual fee to be paid for such license, the sanitary requirements, provisions as to location and prohibiting the operation in the night time in a residence that is used for residential purposes. Then follows the provision for inspection and the penalty of not less than $10 nor more than $100 for violation of the ordinance.

On the trial it appears that the defendant had obtained a license and that it was violated the provisions of the ordinance according to its terms xxxxxxxxxxxxxxxxxxxx and according to the definition of what constitutes a residence under such ordinance.

Attorney Dorsey challenges the power of the city of Aurora alleging that it had no right under the law to issue this kind of an ordinance which would include the citizens of the outlying. This at once brings us to the consideration of the question as to whether or not the city has the power under the power to pass this ordinance, which is the crux of this case.

Section 110, par. 50, par. 78 (ill. Stat. ch. 24, par. 1050), provides as follows:

> "Aurora shall be vested directly in the corporate authorities in all cases in which a franchise or license or the validity of an ordinance or a construction of the constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the state is interested as a party in interest."

In deciding this case, City of Aurora v. Inspectional

Register Co., 360 Ill. 602, the Supreme Court in its opinion, said:

> "Rule 38 of the rules of this court, so far as pertinent, provides that 'in all cases the party prosecuting an appeal in the Supreme or Appellate Court shall furnish a complete abstract of the record, referring to the pages of the record by numerals on the margin. * * * The abstract must be sufficient to present fully every error relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part.' This rule is substantially the same as rule 14 of the previous rules of this court. The abstract must show that a constitutional question was raised in the trial court. * * * The abstract here filed does not show that a constitutional question was raised. It states that the trial judge signed a 'certificate of importance', but such statement does not show a constitutional question presented."

We are precluded by the statute from considering the question of the validity of the ordinance here and, as heretofore stated, the defendant having violated the ordinance according to its terms, the judgment of the Municipal Court is hereby affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

Rehlander Co., 300 Ill. 503, the Supreme Court in its opinion, said:

> "Rule 20 of the rules of this court, so far as pertinent, provides that 'in all cases the party prosecuting an appeal in the Supreme or Appellate Court shall furnish a complete abstract of the record, referring to the pages of the record by numerals on the margin. * * * The abstract must be sufficient to present fully every error relied upon, and it will be taken to be complete and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part.' This rule is substantially the same as rule 14 of the previous rules of this court. The abstract must show that a constitutional question was raised in the trial court. * * * The abstract here filed does not show that a constitutional question was raised. It states that the trial judge signed a 'certificate of importance', but such statement does not show a constitutional question presented."

We are precluded by the statute from considering the question of the validity of the ordinance here and, as hereinbefore stated, the defendant having violated the ordinance according to its terms, the judgment of the municipal court is hereby affirmed.

JUDGMENT AFFIRMED.

HALL, P.J., AND MCGAN, J., CONCUR.

38510

CARL M. WHITE,

Appellant,

v.

JOHN J. MITCHELL,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

284 I.A. 647

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Municipal Court of Chicago. Suit was commenced on a note for $25 dated March 25, 1933, payable as follows: Ten dollars on April 10, 1933; Ten dollars on April 25, 1933 and five dollars on May 10, 1933, with interest at seven per cent per annum from date. The note contained a further provision:

> " * * * if placed in the hands of an attorney for collection, I or we agree to pay the sum of Twenty-five Dollars attorney's fees as so much additional indebtedness hereon, and if suit is brought upon this note said sum shall be included in any judgment rendered against me, us or either, or any of us on this note."

The defense in this case was usury. The defendant testified that the plaintiff told him he would have to pay $30 instead of $25, the face of the note. This statement was denied by the plaintiff. Judgment was rendered for defendant and against the plaintiff with costs, from which this appeal is perfected. The defendant having relied upon the defense of usury, the burden of proof is on him to prove such defense by a preponderance of the evidence. Puterbaugh v. Farrell, 73 Ill. 213.

No sustaining or corroborating evidence or circumstance was offered by the defendant to sustain his rather uncertain statement concerning a demand by the plaintiff for an excess amount over and above the amount appearing on the face of the note. In this regard we hold that the defendant did not sustain the burden so placed upon him and failed to prove his defense of usury.

22823

OTTO E. WAITZ,

Appellant,

v.

JOHN J. MITCHELL,

Appellee.

Appeal from

Municipal Court

of Chicago.

224 I.A. 647

Mr. JUSTICE MARTIN E. SULLIVAN delivered the opinion of the Court.

This is an appeal from the Municipal Court of Chicago.

Suit was commenced on a note for $25 dated March 14, 1922, payable as follows: Ten dollars on April 10, 1922; ten dollars on April 10, 1923 and five dollars on day 10, 1924, with interest at seven per cent per annum from date. The note contained a further provision:

> " " " if placed in the hands of an attorney for collection, I or we agree to pay the sum of twenty-five Dollars attorney's fees as one of the additional indebtedness thereon, and if suit be brought thereon, this note said sum shall be included in the judgment rendered against me, us or either, or any of us, in said suit."

The defense in this case was usury. The statement testified that the plaintiff told him he could give up any of the interest of $25, the face of the note. Such statements are denied by the plaintiff. Judgment was rendered in favor of defendant and against the plaintiff with costs, from which this appeal is prosecuted. The determination having rested upon the question of usury, the burden of proof is on him to prove such defense by a preponderance of the evidence. Wakefield v. Tuttle, 72 Ill. App. 19.

No contention or argument - the evidence of transactions was offered by the defendant to establish an usurious transaction attempted concealed, denied by the plaintiff for an excess amount over and above the amount appearing on the face of the note. In this regard we hold that the defendant did not sustain the burden so placed upon him and failed to prove his defense of usury.

We do think, however, that the provision for a $25 attorney's fee in a case involving a $25 loan is excessive. One of the elements in fixing attorney's fees is the amount involved. We think that in proportion to the amount involved a fee of $10 would have been sufficient.

We are of the opinion that the court erred in finding the issues for the defendant and for the reasons above given the judgment of the Municipal Court is hereby reversed and judgment is entered here for plaintiff for $25 with interest thereon from the date of said note plus $10 for attorney's fees.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR PLAINTIFF.

HALL, P.J. AND HEBEL, J. CONCUR.

We do think, however, that the provision for the attorney's fee in a case involving a $50 loan is excessive. One of the elements in fixing attorney's fees is the amount involved. We think that in proportion to the amount involved a fee of $10 would have been sufficient.

We are of the opinion that the court erred in finding the issues for the defendant and for the reasons above given the judgment of the Municipal Court is hereby reversed and judgment is entered here for plaintiff for $50 with interest thereon from the date of said note plus $10 for attorney's fees.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR PLAINTIFF.

MAIN, J.J. AND MARCH, J. CONCUR.

38573

PETER PEKAR, Appellant,	
vs.	APPEAL FROM SUPERIOR COURT
ANDREW LUPTAK and ANNIE LUPTAK, Defendants. THEODORE CICHY, Receiver, Appellees.	OF COOK COUNTY.

32

204 I.A. 648

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff in a foreclosure proceeding from an order directing the receiver to permit defendants, owners of the equity of redemption, to remain in the premises during the period of redemption without paying any rent. Defendants do not appear in this court to support the order.

By the trust deed foreclosed defendants pledged the rents and profits of the premises, waived all right to possession of and income from the premises pending foreclosure and until the expiration of the period of redemption. The proceedings went to a decree and sale, with a deficiency decree entered against defendants for $895.92. Thereafter plaintiff filed a petition for the appointment of a receiver, reciting the sale and deficiency decree; that the improvements consist of a two story brick building containing two flats and rooms in the basement; that one flat was occupied by defendants; that the property was in a dilapidated condition; that the premises were worth not more than the amount of the sale, and that the taxes for the years 1930 to 1934, amounting to approximately $895, were unpaid.

An order was thereupon entered appointing a receiver and directing all persons in possession of the premises to pay rent to the receiver. In August, 1935, the receiver applied for an order requiring defendants to pay rent or vacate the premises, but the chancellor entered the order permitting defendants to occupy

38875

PETER PEKAR,
Appellant,

vs.

ANDREW LUPTAK and ANNIE LUPTAK,
Defendants.
THEODORE GIORY, Receiver,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

204 I.A. 648

MR. PRESIDING JUSTICE MORGANLY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff in a foreclosure proceeding from an order directing the receiver to permit defendants, owners of the equity of redemption, to remain in the premises during the period of redemption without paying any rent. Defendants do not appear in this court to support the order.

By the trust deed foreclosed defendants pledged the rents and profits of the premises, waived all rights to possession of and income from the premises pending foreclosure and until the expiration of the period of redemption. The proceedings went to a decree and sale, with a deficiency decree entered against defendants for $3865.02. Thereafter plaintiff filed a petition for the appointment of a receiver, reciting the sale and deficiency decree; that the improvements consist of a two story brick building containing two flats and rooms in the basement; that one flat was occupied by defendants; that the property was in a dilapidated condition; that the premises were worth but more than the amount of the sale, and that the taxes for the years 1930 to 1944, amounting to approximately $[illegible], were unpaid.

An order was thereupon entered appointing a receiver and directing all persons in possession of the premises to pay rent to the receiver. In August, 1938, the receiver applied for an order requiring defendants to pay rent or vacate the premises, but the chancellor entered the order permitting defendants to occupy

the premises without the payment of rent during the period of redemption.

We have already had occasion to consider the conflicting claims to possession, during the period of redemption, of a receiver and the owner of the equity of redemption. Peritz v. Taub, 279 Ill. App. 264. In that case, as here, there was a deficiency decree and a receiver appointed to collect the rent and income of the property during the period of redemption. There it was ordered that the owner of the equity might continue to occupy one of the apartments of the building upon paying a monthly rental to the receiver; she appealed from that order, claiming that as owner of the equity of redemption she was entitled to remain in possession during the period of redemption without payment of rent. We sustained the order of the court in that case, saying, among other things, that the court should protect the rights of the mortgagee-complainant by placing the receiver in possession and by directing the mortgagor owners to pay rent for the occupied premises. Based upon the reasoning and cases cited in the Taub case, we hold that in the instant case the court should not have entered the order from which this appeal is taken, and it is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

the premises without the payment of rent during the period of redemption.

We have already had occasion to consider the conflicting claims to possession, during the period of redemption, of a receiver and the owner of the equity of redemption. Ferris v. Tang, 279 Ill. App. 264. In that case, as here, there was a deficiency decree and a receiver appointed to collect the rent and income of the property during the period of redemption. There it was ordered that the owner of the equity might continue to occupy one of the apartments of the building upon paying a monthly rental to the receiver; she appealed from that order, claiming that as owner of the equity of redemption she was entitled to remain in possession during the period of redemption without payment of rent. We sustained the order of the court in that case, saying, among other things, that the court should protect the rights of the mortgagee-complainant by placing the receiver in possession and by directing the mortgagor owners to pay rent for the occupied premises. Based upon the reasoning and cases cited in the Tang case, we hold that in the instant case the court should not have entered the order from which this appeal is taken, and it is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

38601

MARY FREEMAN,
Appellee,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

284 I.A. 648

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff's declaration alleged that she ate some food she bought from defendant, that it was unfit for human consumption and made her ill. Upon trial she had a verdict for $900 and defendant appeals from the judgment.

Defendant first says that there is no testimony in the record that any goods were sold by defendant to plaintiff or that defendant ever made any warranties to plaintiff. We cannot support either contention. Plaintiff testified that June 13, 1933, she directed a boy, Daniel Whipper, to go to one of defendant's stores to purchase some liver sausage and crackers for her, giving him a dollar to pay for them; that he brought back the food and change to her. Daniel Whipper testified that pursuant to plaintiff's instructions he went to defendant's store and bought thirteen cents worth of liver sausage and some crackers with the money given him by plaintiff and delivered them, with the change, to plaintiff. This was sufficient evidence that plaintiff, through her agent, purchased the food in question from defendant.

A retailer dealer in foodstuffs, selling the same for domestic use and consumption, impliedly warrants that they are sound and wholesome and fit to be eaten, and he is liable in damages if they prove to be otherwise, whether he was aware of their condition or not. Greenwood v. John R. Thompson Co., 213 Ill. App. 371, and cases there cited.

Complaint is made that counsel for plaintiff put leading

58601

MARY TREREAR,
Appellee,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2 84 I.A. 648

MR. PRESIDING JUSTICE MORSCHZEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff's declaration alleged that she ate some food she bought from defendant, that it was unfit for human consumption and made her ill. Upon trial she had a verdict for $800 and defendant appeals from the judgment.

Defendant says that there is no testimony in the record that any goods were sold by defendant to plaintiff or that defendant ever made any warranties to plaintiff. We cannot support either contention. Plaintiff testified that June 13, 1933, she directed a boy, Daniel Whipper, to go to one of defendant's stores to purchase some liver sausage and crackers for her, giving him a dollar to pay for them; that he brought back the food and change to her. Daniel Whipper testified that pursuant to plaintiff's instructions he went to defendant's store and bought fifteen cents worth of liver sausage and some crackers with the money given him by plaintiff and delivered them, with the change, to plaintiff. This was sufficient evidence that plaintiff, through her agent, purchased the food in question from defendant.

A retailer dealer in foodstuffs, selling the same for domestic use and consumption, impliedly warrants that they are sound and wholesome and fit to be eaten, and he is liable in damages if they prove to be otherwise, whether he was aware of their condition or not. Greenwood v. John R. Thompson Co., 218 Ill. App. 371, and cases there cited.

Complaint is made that counsel for plaintiff put leading

questions to the witness Whipper, but we find nothing in this connection of sufficient importance to justify a reversal.

Lee Troth testified on behalf of plaintiff that he was a chemist, employed by the Chicago Board of Health; that he had made a chemical analysis of a sample of the liver sausage, which the evidence showed was part of the liver sausage in question; that from his analysis he found it to be "in a putrid state," and in answer to a further inquiry as to what that meant, said "It simply means it is inan condition unsuitable for consumption." It is said that this answer had a tendency to usurp the functions of the jury. The witness had qualified as an expert in the study of chemistry, with special reference to testing for poisons. The answer objected to was merely an explanation as to what the witness meant when saying that the sausage was "in a putrid state." The witness did not attempt to show what affect the ingestion of such food would have upon the human system. Moreover, the statement that putrid food was unfit for human consumption would be universally accepted as a truism. The explanatory answer really added nothing to his original report as to the state of the food examined by him.

There was sufficient evidence that the injury sustained resulted directly from the unwholesome food sold by defendant. Plaintiff testified that when Whipper delivered the food to her she cut off a piece of the liver sausage, placed it between two of the crackers, wrapped the balance of the sausage in the paper in which it came and immediately placed this uneaten part in the ice box. This was about 1:30 p. m. She ate the sandwich, and nothing else, and had nothing to eat previously on that day or the evening before. Within five or ten minutes after eating the sandwich she became sick, with abdominal pains. Dr. Rogers was called and he gave her a hypodermic injection and treated her; he attended her twice on the same day and twice a day for eight days thereafter. He tes-

questions to the witness Whipper, but we find nothing in this connection of sufficient importance to justify a reversal.

Lee Troth testified on behalf of plaintiff that he was a chemist, employed by the Chicago Board of Health; that he had made a chemical analysis of a sample of the liver sausage, which the evidence showed was part of the liver sausage in question; that from his analysis he found it to be "in a putrid state," and in answer to a further inquiry as to what that meant, said "It simply means it is less condition unsuitable for consumption." It is said that this answer had a tendency to usurp the functions of the jury. The witness had qualified as an expert in the study of chemistry, with special reference to testing for poisons. The answer objected to was merely an explanation as to what the witness meant when saying that the sausage was "in a putrid state." The witness did not attempt to show what effect the ingestion of such food would have upon the human system. Moreover, the statement that putrid food was unfit for human consumption would be universally accepted as a truism. The evidentiary answer really added nothing to the original report as to the state of the food examined by him.

There was sufficient evidence that the injury sustained resulted directly from the unwholesome food sold by defendant. Plaintiff testified that when Whipper delivered the food to her she cut off a piece of the liver sausage, placed it between two of the crackers, wrapped the crackers in the sausage in the paper in which it came and immediately placed this sandwich with the rest in the box. This was about 1:00 p. m. She ate the sandwich, of course, alone, and had nothing to eat previously on that day or the evening before. Within five or ten minutes after eating the sandwich she became sick, with abdominal pains. Dr. Rogers was called and he gave her a hypodermic injection and treated her; he attended her twice on the same day and twice a day for eight day thereafter. He per-

tified that he was called to see plaintiff at her home; found her abdomen distended, pulse rapid, temperature subnormal, and she was vomiting and wretching; he washed out plaintiff's stomach and found particles of meat resembling liver sausage in the food vomited; the Doctor testified that in his opinion she was suffering from toxic poisoning and infection of the gastrointestinal tract and that such condition would be caused by ingestion of putrefied meat.

Defendant's counsel developed from the Doctor that plaintiff had been suffering from a moderate sized fibrous tumor of the uterus for some time before the instant occasion, and he had recommended an operation. While there was some testimony tending to suggest that the illness might have resulted from other causes, the Doctor gave as his opinion that her sickness upon this occasion was directly attributable to and resulted from the liver sausage she had ingested, and the jury could properly find this to be the fact.

There is some suggestion that the sample of liver sausage analyzed by the chemist of the Chicago Board of Health must have necessarily become putrid between the time the sausage was eaten by plaintiff and such analysis. A witness testified that the day after plaintiff was taken ill he took the remaining piece of liver sausage to the police station, as the Doctor instructed him to do; the police sergeant told him to take it to the county hospital, which he did the following day, and was there told to take it to the Chicago Board of Health in the city hall, which he did, and where it was examined by the city chemist. The evidence shows that the sample submitted for analysis was continuously kept in an ice box except when carried for examination. There is no evidence that putrefaction set in between the time plaintiff ate the piece and the time the remainder was analyzed by the city chemist. The fact that plaintiff was sickened immediately after she ate it and that the remaining piece was kept in the ice box until two days there-

tified that he was called to see plaintiff at her home; found her abdomen distended, pulse rapid, temperature subnormal, and she was vomiting and retching; he vented out plaintiff's stomach and found particles of meat resembling liver sausage in the food vomited; the Doctor testified that in his opinion she was suffering from toxic poisoning and infection of the gastrointestinal tract and that such condition would be caused by ingestion of putrefied meat.

Defendant's counsel developed from the Doctor that plaintiff had been suffering from a moderate sized fibroma tumor of the uterus for some time before the instant occasion, and he had recommended an operation. While there was some testimony tending to suggest that the illness might have resulted from other causes, the Doctor gave as his opinion that her sickness upon this occasion was directly attributable to and resulted from the liver sausage she had ingested, and the jury could properly find this to be the fact.

There is some suggestion that the sample of liver sausage analyzed by the chemist of the Chicago Board of Health must have necessarily become putrid between the time the sausage was eaten by plaintiff and such analysis. A witness testified that the day after plaintiff was taken ill he took the remaining piece of liver sausage to the police station, as the Doctor instructed him to do; the police sergeant told him to take it to the county hospital, which he did the following day, and was there told to take it to the Chicago Board of Health in the city hall, which he did, and where it was examined by the city chemist. The evidence shows that the sample submitted for analysis was continuously kept in an ice box except when carried for examination. There is no evidence that putrefaction set in betwen the time plaintiff ate the piece and the time the remainder was analyzed by the city chemist. The fact that plaintiff was sickened immediately after she ate it and that the remaining piece was kept in the ice box until two days thera-

after when the chemist found that it was putrefied, raises a strong presumption that it was in this condition at the time plaintiff ate of it.

Various alleged inconsistencies with reference to comparatively unimportant points are presented. The jury saw the witnesses and could pass upon their credibility better than can we. We would not be justified in finding that the verdict is manifestly against the greater weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

Ketchett and O'Connor, JJ., concur.

after when the obvolet found that it was material, raises a strong presumption that it was in this condition at the time plaintiff sue of it.

Various alleged inconsistencies with reference to comparatively unimportant points are presented. The jury saw the witnesses and could base upon their credibility better than can we. We would not be justified in finding that the verdict is manifestly against the greater weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

Batchelt and O'Connor, JJ., concur.

38346

W. JASKOWIAK,
Appellant,

vs.

GEORGE PAPPAS,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 648

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

January 17, 1935, plaintiff caused a judgment by confession to be entered against defendant for the sum of $465.71, with costs. The suit was for a balance alleged to be due upon four promissory notes, two of which were made January 9, 1932, and the other two March 16, 1932, all to the order of Julius Bender, Inc. These notes were signed by defendant and contained power of attorney to confess judgment, and each stated upon the face that it was secured by chattel mortgage of even date executed by defendant. Plaintiff sued as assignee of the notes.

Defendant thereafter moved to set aside the judgment. The motion was supported by an affidavit to the effect, in substance, that the balance of the indebtedness represented by these notes had been assumed and in fact paid to Julius Bender, Inc. by the Alpha Grocery & Market, Inc., and that the entry of judgment against defendant was pursuant to a conspiracy of former associates, who were now competitors of defendant in business, with the desire to injure and harass him.

The court opened up the judgment, heard the evidence and made a finding for defendant, upon which judgment was entered for costs in defendant's favor. From this judgment plaintiff has perfected this appeal.

The controlling question in the case is whether the finding of the court (which is entitled to the same weight as the verdict of a jury) is clearly and manifestly against the weight of the evidence. It is not controverted that at the time these notes were

38346

W. JARKOWIAK, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
GEORGE PAPPAS, Appellee.	2841 I.A. 648

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

January 17, 1933, plaintiff caused a judgment by confession to be entered against defendant for the sum of $465.71, with costs. The suit was for a balance alleged to be due upon four promissory notes, two of which were made January 9, 1932, and the other two March 16, 1932, all to the order of Julius Bunder, Inc. These notes were signed by defendant and contained power of attorney to confess judgment, and each stated upon the face that it was secured by chattel mortgage of even date executed by defendant. Plaintiff sued as assignee of the notes.

Defendant thereafter moved to set aside the judgment. The motion was supported by an affidavit to the effect, in substance, that the balance of the indebtedness represented by these notes had been assumed and in fact paid to Julius Bunder, Inc. by the Alpha Grocery & Market, Inc., and that the entry of judgment against defendant was pursuant to a conspiracy of former associates, who were now competitors of defendant in business, with the desire to injure and harass him.

The court opened up the judgment, heard the evidence and made a finding for defendant, upon which judgment was entered for costs in defendant's favor. From this judgment plaintiff has perfected this appeal.

The controlling question in the case is whether the finding of the court (which is entitled to the same weight as the verdict of a jury) is clearly and manifestly against the weight of the evidence. It is not controverted that at the time these notes were

executed defendant conducted a grocery business at 2606 Lawrence avenue, and that the notes were given to Julius Bender, Inc., for the purchase price of fixtures to be used in that business. In January, 1933, the business was turned over to a corporation organized by the parties interested, to which was given the name Alpha Grocery & Market, Inc. Defendant with four other persons, Chris A. Soulias, Charles Alexander, Dean Alexander and Maria Bakiaris, became stockholders in this corporation, and defendant turned over to it his stock in trade, his business and fixtures. The capital stock seems to have been $2000, and each of the stockholders contributed $400 and received stock of the par value of that amount. Defendant testified and gave evidence tending to show that the agreement was that the corporation would assume and pay these outstanding notes, which were secured by chattel mortgages on the fixtures which with other property were delivered to the corporation. He says the agreement was to that effect, and:

"I went to Bender Company and told them the other fellows would pay the notes. I told them not to worry, that the corporation would pay the notes. I told Bender & Company, president of the corporation, Chris Soulias would pay the notes, that he is the man who pays all the bills."

Defendant's testimony is also that after this corporation was organized he made no further payments upon the notes.

Mr. Bosomburg acted as attorney in the organization of the corporation (at whose request does not clearly appear). He says he turned the minute book over to defendant, and further:

"*** Mr. Pappas said I owe six or seven hundred dollars, and I am getting $1600 more into the business. That should be enough money to clear up everthing.

I said to Pappas, 'As long as everything is paid up, all right.' I asked Mr. Pappas to get me a statement of his creditors, and Mr. Soulias says, 'Oh, I know Pappas. We will work this thing out among ourselves. The debts will be paid all right. The corporation starts clear.'"

Mr. Bosomburg further testifies that Pappas did not say anything to him about the mortgage on the fixtures but said he owed six or seven

executed defendant conducted a grocery business at 8004 Lawrence avenue, and that the notes were given to Julius Sender, Inc., for the purchase price of fixtures to be used in that business. In January, 1934, the business was turned over to a corporation organized by the parties interested, to which was given the name Alpha Grocery & Market, Inc. Defendant with four other persons, Chris A. Doulias, Charles Alexander, Sam Alexander and Maria Zakiaris, became stockholders in this corporation, and defendant turned over to it his stock in trade, his business and fixtures. The capital stock seems to have been $5000, and each of the stockholders contributed $800 and received stock of the par value of that amount. Defendant testified and gave evidence tending to show that the agreement was that the corporation would assume and pay these notes, which were secured by chattel mortgages on the fixtures which other property were delivered to the corporation. He says the agreement was to that effect, and:

"I went to Sender Company and told them the other fellows would pay the notes. I told them not to worry, the corporation would pay the notes. I told Sender & Company, president of the corporation, Chris Doulias would pay the notes, that he is the man who pays all the bills."

Defendant's testimony is also that after this corporation was organized he made no further payments upon the notes.

Mr. Rosenberg noted an attorney in the organization of the corporation (at whose request does not clearly appear). He says he turned the minute book over to defendant, and further:

"Mr. Pappas said I owe six or seven hundred dollars, and I am getting $1800 more than the business. That should be enough money to clear up everything.

I said to Pappas, 'As long as everything is paid up, all right.' I asked Mr. Pappas to get me a statement of the creditors, and Mr. Doulias says, 'Mr. I know Pappas. He will work this thing out a good business. The debts will be paid all right. The corporation starts clear.'"

Mr. Rosenberg further testifies that Pappas did not say anything to him about the mortgage on the fixtures but said he owed six or seven

hundred dollars which would be paid out of the money the other people would put in. Other witnesses for plaintiff gave testimony to the same effect.

The question of whether the parties agreed that the corporation would assume and pay this indebtedness is one which presents a sharp issue of fact.

Mr. Guggenheim of the Bender Co. testified that he knew the property had passed into possession of the new corporation, that he sent the bills to its president, Mr. Soulias, and that for about two years thereafter the installments due were paid by either defendant or the corporation. Receipts in evidence would indicate that a number of payments were made by defendant.

Mr. Vasilakos, who acted as accountant for the Alpha Grocery corporation, testified that when he took over the books of the corporation in June, 1933, the item due to the Bender Co. was listed among the liabilities; that he prepared the statements, which are in evidence, showing liabilities of the corporation, and that these statements were true and correct representations of the assets and liabilities and were presented to all the stockholders of the company; that he made four copies of the statements and left three at the office; that he read Exhibit 8 (a statement of assets and liabilities) at the meeting of the stockholders, and that there was a conversation about it and some quarreling, but that nothing was mentioned at the meeting about the payment of the Bender mortgage. This statement shows that the corporation had taken on these liabilities to Bender, Inc. The witness stated on cross-examination that he was related to defendant by marriage.

November 16, 1934, Julius Bender, Inc., demanded payment of this indebtedness and sent a bailiff to foreclose the two mortgages and to take possession of the property. On the same day, the evidence shows, Soulias or Boscmburg paid the sum due and received from

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Mr. Guggenheim of the Bar of D.C. testified that he knew the property had passed into possession of the new corporation, that he sent the bills to its president, Mr. Sonline, and that for about two years thereafter the installments due were paid by either defendant or the corporation. Receipts in evidence would indicate that a number of payments were made by defendant.

Mr. Vasilakos, who acted as accountant for the Alpha Grocery corporation, testified that when he took over the books of the corporation in June, 1922, the item due to the Bender co. was listed among the liabilities; that he prepared the statements, which are in evidence, showing liabilities of the corporation, and that these statements were true and correct representations of the assets and liabilities and were presented to all the stockholders of the company; that he made four copies of the statements and left three at the office; that he read Exhibit 6 (a statement of assets and liabilities) at the meeting of the stockholders, and that there was a conversation about it and some quarreling, but that nothing was mentioned at the meeting about the payment of the Bender mortgage. This statement shows that the corporation had taken on these liabilities to Bender, Inc. The witness stated on cross-examination that he was related to defendant by marriage.

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Julius Bender, Inc., the notes, the mortgages being assigned and the notes duly endorsed without recourse and without warranty. The testimony as to this transaction also is in direct conflict. Guggenheim testifies that defendant told him to see Soulias, who would pay, and defendant says that he saw these papers in the possession of Soulias and demanded them after payment was made, but that Soulias said the papers belonged to the corporation and that he wanted to keep them to show that he had paid them. Soulias, on the other hand, testified that when Julius Bender, Inc., was about to take possession he called up attorney Bosomburg, that they met defendant at Bender's office, and that defendant said he didn't have the money to pay; so (the witness says) "I borrowed $300 from Mr. Jaskowiak." He explains that he did not know Mr. Jaskowiak but got in touch with him through Bosomburg. He says that he told defendant that the loan was for sixty days, and that defendant said he would take care of it. The evidence tends to show that Soulias gave the money to Mr. Bosomburg, and that the notes and mortgage were delivered to Bosomburg and by him given to plaintiff. Soulias says these papers were to be held by plaintiff as security. Soulias also testifies that he bought out the interest of defendant in the Alpha corporation on November 23rd, and gave defendant $200, which defendant agreed he would use to pay Jaskowiak.

Plaintiff Jaskowiak testified that he received the notes and mortgages November 16, 1934; that he received them from Mr. Wagner, his attorney, and that Wagner promised him he would get his money back in sixty days and that he would make a profit of $60 in the transaction. Plaintiff says that he never knew defendant Pappas; that he never made any demand for payment from him; that he knew the notes were past due when he took them; that he never went to the Alpha Grocery & Market, Inc., to demand payment and never undertook to foreclose the mortgages. On the contrary, he entered judgment

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Plaintiff testified that he received the notes and mortgages November 1, 1921; that he received them from Mr. Wagner, his attorney, who had taken them and that he would get his money back in sixty days and that he would keep a portion of the transaction. Plaintiff says that he never knew defendant; that he never made any demand for payment from him; that he knew the notes were due when he took them; that he never went to the Alpine Property & Market, Inc., to demand payment; he never undertook to foreclose the mortgage. On the contrary, he entered judgment

upon the notes and caused a levy to be made upon another grocery business then conducted by defendant on the same street and near the Alpha Grocery, Inc.

The evidence is very much in conflict, and it is perfectly apparent from a consideration of it that some of the witnesses were not trying to tell the truth. Upon the whole evidence, that produced by defendant seems more probable. That produced by plaintiff as to the transaction on November 16, 1934, is quite improbable. The incorporation of the Alpha Grocery & Market was made under the advice of an attorney. The transaction involved the purchase of the entire business. The Bulk Sales act was applicable, and it seems only fair to assume that the parties were advised of the indebtedness outstanding. If we assume the contrary (which is improbable) that these parties paid out $1600, relying solely upon the promise of defendant to pay off the mortgage, the second transaction as narrated by them becomes most unlikely. If defendant, in the first transaction, failed to pay as agreed, Soulias and others would hardly a second time, on November 23rd, turn over another sum of money, namely, $200, given for the interest of defendant in the business, without some provision making certain the satisfaction of these mortgages.

It would unduly extend this opinion to discuss in detail the evidence of each witness and the weight of it. It must be sufficient to say that the ultimate issue in the case is one of fact; that the trial court saw and heard the witnesses, and with entire confidence entered the finding in favor of defendant. We cannot say that the finding is against the manifest weight of the evidence, and for that reason the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

upon the notes and caused a levy to be made upon another grocery business then conducted by defendant on the same street and near the Alpha grocery, Inc.

The evidence is very much in conflict, and it is perfectly apparent from a consideration of it that some of the witnesses were not trying to tell the truth. Upon the main evidence, that produced by defendant seems more probable. That produced by plaintiff as to the transaction on November 10, 1924, is quite improbable. The incorporation of the Alpha grocery interest was made under the advice of an attorney. The transaction involved the purchase of the entire business. The main issue not was questionable, and it seems only fair to assume that the parties were satisfied the indebtedness outstanding. If we assume the contrary (which is improbable) that these parties paid our money, relying solely upon the promise of defendant to pay off the mortgage, the second transaction as narrated by them becomes most unlikely. It defendant, in the first transaction, failed to pay as agreed, Dorian and others could hardly a second time, on November 20th, turn over another sum of money, namely, $[illegible], even for the interest of defendant in the business, without some provision ensuring certain the satisfaction of these mortgages.

It would merely cast an idle opinion to discuss in detail the evidence of each witness and weigh it. It must be sufficient to say that and ultimate issue in the case is one of fact; that the trial court has not found in plaintiffs, and with entire confidence entered judgment in favor of defendant. We cannot say that the finding is against the preponderating weight of the evidence, and for that reason the judgment of the trial court is affirmed.

AFFIRMED.

McBurney, P. J., and O'Connor, J., concur.

38557

EDGAR L. GEORGE, Administrator of the Estate of ANTON BOBKUS, Deceased,
Appellee,

vs.

STEVE KANAPE,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

284 I.A. 648

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action by the administrator to recover damages by reason of the alleged wrongful death of plaintiff's intestate, Anton Bobkus, said to have been caused by defendant, Steve Kanape, and upon trial by the court, there was a finding for plaintiff with damages of $5000, upon which the court, overruling the motion of defendant in arrest, entered judgment, from which defendant has appealed. The declaration was in four counts, which, in substance, charged an assault by defendant upon Anton Bobkus, November 28, 1930, resulting in his death. There were pleas of not guilty and justification. Defendant contends the finding and judgment are not sustained by the evidence; that defendant did not have a fair and impartial trial, and that the damages are excessive.

The evidence tends to show that the unfortunate occurrence which resulted in the death of plaintiff's intestate occurred at about one o'clock in the morning of November 28, 1930, in the hallway of a building situated on the northeast corner of 31st street and Emerald avenue, Chicago. Defendant was the owner of this building and Anton Bobkus, the deceased, lived with his father and mother, two brothers and two sisters in a flat on the third floor. The entrance to the apartment was on Emerald avenue by a doorway which led into a hall, from which stairs extended upward to the different flats. South of the hallway on the first floor was a butcher shop conducted by defendant. This shop fronted on 31st street, facing south, and on the same floor back of the butcher shop was an apartment in which defendant lived with his wife.

RODGER L. WOODS, Commissioner of the
Estate of Anna DONAU, Deceased,
Appellee,

vs.

JERRY DONAU,
Appellant.

WM. DUFLON BACHMAN Judge presiding.

In an action by the administrator to recover damages by reason of the alleged wrongful death of decedent's intestate, Anton Donau, and to have been caused by defendant, Jerry Donau, and upon trial by the court, [illegible] in favor of the defendant in error, [illegible] appeal. The [illegible] charged in substance that [illegible] 24, 1930, [illegible] were p[illegible] identification. [illegible] questioned by [illegible] and that the [illegible].

[illegible] which [illegible] about any [illegible] way of a [illegible] and Morris [illegible] [illegible] and [illegible] The [illegible] which led into a [illegible] different [illegible] outside shop [illegible] street, facing south, and in the [illegible] shop was an apartment in which [illegible] [illegible].

There was a door leading from the hallway into this apartment where defendant lived, and this was the same hallway that Anton Bobkus and other occupants of the second and third floors used in going to and fro from their flats. Defendant had owned the building for about seven years, and the family of Bobkus had been tenants there for about five years. So far as the evidence discloses there had never been any trouble between the two families or any member of either of them.

The father of Anton Bobkus, who had not worked for twelve years, was 69 years of age and the mother was 59 years of age. Anton Bobkus was employed by a corporation in making forms on a punch press and earned between $25 and $40 a week. The evidence also tends to show that he helped to support the family, contributing about half of his income for that purpose; that he was in good health and a man of good habits. The father of the deceased, Ludwig Bobkus, testified that on the morning of the occurrence he saw his son cross the street and come into the entrance of the building at about 1:30 o'clock; that he heard him go into the hallway; that there was snow on the ground and he could hear him "shake his leg;" that he heard two shots but did not go down to see what had happened; that he was scared; that a police officer came shortly and told him that the butcher downstairs had shot his son; that his son was in the hospital where he could see him; that when he got to the hospital the body had been taken to the undertakers; that after the funeral he talked with defendant and asked him, "Why did you shoot my boy?" to which defendant replied, "I thought it was a robber; I opened the door and shot him."

Veronica Bobkus, mother of deceased, testified to a conversation with defendant after the funeral; she said defendant came to her home nine days thereafter, and she asked him why he shot her boy; that he replied, "My wife woke me up out of the sleep and I

There was a lane leading from the railway into [illegible] where defendant lived, and [illegible] the same [illegible] Robson and other occupants of [illegible] going to and fro from their flats. Defendant had owned the building for about seven years, and the [illegible] had been tenants for about five years. So far as [illegible] there had never been any trouble between the [illegible] or any member of either of them.

The former of Arthur Robson, who had [illegible] for twelve years, was 69 years of age and the mother was 67 years of age. Arthur Robson was employed by a corporation in making forms on a punch press and earned between £[illegible] and £[illegible] a week. The evidence also tends to show that he [illegible] to [illegible], constituting about [illegible] of his income; [illegible] was in good health and [illegible] of good habits. The [illegible], Ludwig Robson, [illegible] on the morning of the [illegible] he was [illegible] soon after the [illegible] leaving at about 1:30 o'clock; [illegible]; [illegible] there was some [illegible] "[illegible] that he [illegible]; that he was [illegible]; [illegible] that the [illegible] hospital [illegible]; [illegible] the only [illegible] he [illegible] to which [illegible] "[illegible] door and [illegible]."

[illegible] conversation with [illegible] her home [illegible] boy; that he replied, "My [illegible]

shoot him."

Mrs. Paulauski, witness for plaintiff, testified to a conversation between Mrs. Bobkus and defendant in which Mrs. Bobkus asked him why he shot the boy and that defendant replied, "I don't remember why I done that."

Mrs. Helen Roman, a sister of deceased, testified that she was at the inquest held over the body of her brother and heard defendant testify there, and that "he said that he shot through the door and then he said he opened the door and shot again." She said there was only one bullet in her brother's body, as she found the other bullet in the hallway. She also testified:

"He (defendant) said at the corner's inquest how he happened to shoot. He said that he heard noises. He said he heard a noise and his wife woke him up; his wife got the gun and he shot. He said somebody knocked, or something."

Plaintiff undertook to call defendant as a witness, but an objection on behalf of defendant was sustained by the court. However (a motion to find for defendant at the close of plaintiff's evidence having been denied) defendant was called as a witness in his own behalf and testified that on the night of the shooting he went to bed between 10 and 10:30; that he didn't sleep; that about twelve o'clock the dog started to bark in the store; that he got up, took a flashlight and gun and went around the store, finding nobody; that he then went back to bed and about 1:30 his wife "started to holler somebody coming through the door, breaking in the kitchen door;" that he jumped out of bed, went to the door; that somebody knocked "real loud at the door" and said "Let me get in, or I kill you"; that he (the witness) shot him through the door; "I opened and he tried to get inside. I shot the second shot after I closed that door back. I opened the door and I saw the fellow from upstairs"; that then his wife called the police and Anton Bobkus was taken to the hospital, and they went to the station. Defendant said that he did not know who it was before

he opened the door the second time; that his wife was nervous; that they had burglars several times before this. The record shows that the following examination of defendant by his attorney took place:

"Q. Were you drinking? A. No, sir.
Q. Had you drank anything? A. Sometimes.
Q. Did you drink any intoxicating liquor that night?
A. No, I was working to 10 o'clock.
******
Q. Were you sober? A. I was tired.
Q. I am tired, too. I am asking you whether you were sober? A. No.
Q. Were you drunk? A. I don't drink.
Q. You mean you don't drink whiskey, or intoxicating liquor?
A. I don't care much about it.
Q. Do you drink it? A. No."

On cross examination it appeared that defendant testified at the coroner's inquest to the effect that the dog started to bark, his wife woke up, he went to the storeroom with a flashlight; looked it over and it was all right; that he went to sleep again, was sleeping when his wife woke him up and said that "somebody knocked at the door"; that he got his slippers and went to the door; that she called him back and gave him the gun which he had under the pillow; that he then went to the door and hollered, "Who is there?" that he shot through the door once, then opened the door two or three inches when Anton Bobkus tried to slip inside, and he (witness) shot through the opening of the door; he said he did not tell the coroner's jury of the demand of Bobkus, "Let me in, or I kill you," because he was excited. Defendant and some of the witnesses speak the Lithuanian language and their knowledge of English was apparently quite deficient. The law applicable in cases of this kind was well settled at common law (see Cooper's Case, Cro. Car. 544, 79 Eng. Reprint, 1069; Wharton, Criminal Law, 9th ed., vol. 1, sec. 503; 1 Bishop's New Criminal Law, sec. 858, p. 610.) The authorities of different jurisdictions are reviewed in 25 A. L. R. 509, and the rule of the common law has been enacted

he opened the door the second time; that his wife was anxious; that they had burglars several times before this. The police above that the following examination of Lorenzo by his attorney took place:

"Q. Were you drinking? A. No, sir.
Q. And you were sober? A. Sober.
Q. Did you drink any intoxicating liquor that night?
A. No. I was working to it o'clock.
Q. Were you sober? A. I was tired.
Q. I am tired, too. I am asking you whether you were sober? A. Yes.
Q. Were you drunk? A. I don't know.
Q. You mean you don't drink whiskey, or intoxicating liquor?
A. I don't care much about it.
Q. Do you drink it? A. No."

On cross-examination it appeared that Lorenzo's testimony at the coroner's inquest to the effect that when he arrived in Dana, his wife came up, he went to the assistance with a lamplight; opened it over and I was the light; that he went to bed again, and discovering that his wife was not in bed, that "everybody assembled at the door"; that he got his clothes on and went down; that he called his boy and gave him the lamp; that he found his wife lying on the floor, with a pillow; that he took her up and laid her on the sofa, "Is it there?" that he got blood on his hands, and wiped them on two or three rooms when found; that he found, on the (kitchen) and (illegible) [illegible]: "I did not tell the coroner's jury that I had [illegible] or I kill you." [illegible] witnesses proved the [illegible] of Lorenzo's [illegible] Dunlap was somewhat [illegible]. [illegible] these of this case the well [illegible] Case, Ore. Car. Kia, Ch. Ch. [illegible]; [illegible], 93N et., vol. 1, sec. Aug; I [illegible] [illegible], 7. Ohio.) The [illegible] of [illegible] in 25 N. E. R. 422, and the rule of the [illegible]

into statute in Illinois (see Ill. State Bar Stats., 1935, chap. 38, sec. 148, p. 1200) and is expounded in decisions of our Supreme court. Hayner v. People, 213 Ill. 142; Foster v. Shepherd, 258 Ill. 164; People v. Willy, 301 Ill. 307. In these decisions the courts have been careful to distinguish between the rules applicable in cases of homicide in self-defense and homicide committed in defense of home or habitation, the latter rule being, in substance, that a person may kill in order to prevent any unlawful entry into his home and also will be justified in doing so when the attempt to enter is not real but appears to be reasonably probable. The evidence in this case disclosed an issue of fact on which the finding of the trial court would be entitled ordinarily in this court to the same weight as the verdict of the jury. The record in this case is such that we hold with reluctance that defendant did not have that fair and impartial trial to which he was entitled under the law. Indeed, it appears neither of the parties had a fair and impartial trial, for the reason that from the beginning to the end the trial judge undertook to perform the divergent functions of judge of the court and counsellor and attorney for both parties. The witness Helen Roman was asked 161 questions, of which the judge propounded 65; the witness, Mary Paulauski, 23 questions, of which the court asked 9; Veronica Bobkus, 27 questions, 13 of which were asked by the trial judge; Ludwig Bobkus, 28 questions, 15 of which were asked by the judge. Of the 48 questions propounded to defendant, 26 were by the court. Summarizing, out of 285 interrogatories in the entire trial the court propounded 128, or almost half, while counsel for defendant succeeded in asking ten questions. Such participation by a judge in the trial of the case is not consistent with that fair and impartial judicial attitude which is indispensable in the administration of justice. As our Supreme court said in People v. Rongetti, 331 Ill. 581:

into evidence. Illinois (see Ill. State Bar Stats., 1957, ch. 38, sec. 114, p. 1300) and is supported in decisions of our American courts. Hawkins v. People, 214 Ill. 14; People v. Kennedy, 159 Ill. 148; Spring v. Ville, 83 Ill. 80. In cases dealing the courts have been careful to distinguish between the rules applicable in cases of homicide in self-defense and homicide committed in defense of home or habitation. The latter rule holds, in substance, that a person may kill in order to prevent any unlawful entry into his home and also will be justified in doing so when the attempt to enter is not real but appears to be reasonably probable. The evidence in this case discovered an issue of fact on which the finding of the trial court could be sustained conformably in this court to the same weight as the verdict in the jury. The record in this case is such that we deal with relationships that determine not mere that fair and impartial trial to which he was entitled under the law. Indeed, it appears evident of the defendant's fair and impartial trial, for the reason that from the beginning to the end the trial judge undertook to protect the defendant's rights of judge of the court and counselor and witness, for fair dealing. The witness John Doman was asked 167 questions, of which the judge propounded 87; the witness, Gary Dalkowski, 17 questions, of which the court asked 9; Veronica Johnson, 17 questions, 11 of which were asked by the trial judge; Sandy Molina, 56 questions, 17 of which were asked by the judge. If the defendant propounded to defendant, 26 were by the court. Moreover, out of the interrogatories in the entire trial the court propounded 1/3, or nearly half, while counsel for defendant, amounted to nothing on questions. Such participation by a judge in the trial of the case is not inconsistent with that fair and impartial judicial attitude which is indispensable to the administration of justice. In our opinion, court said in People v. Kennedy, 159 Ill. 148:

"Instances are rare and conditions exceptional which will justify the presiding judge in entering upon and conducting an extended examination of witnesses, and the exercise of a sound discretion will seldom deem such action necessary or advisable. Dunn v. People, 172 Ill. 582."

This attitude of the Supreme court was reaffirmed by the use of similar language in People v. Bernstein, 250 Ill. 63, and the principle was held applicable in cases tried by the court without a jury in People v. Giacomino, 347 Ill. 523. These were criminal cases, but the reasons for the rule are also applicable to civil controversies.

Repeatedly in the trial of the case discourteous remarks were made by the trial judge concerning defendant's attorney, and also continuously during the case the trial judge spoke in a disrespectful way of the evidence given by the witnesses. The following examination of the witness Mary Paulauski is illustrative:

"Mr. Cochrane (attorney for plaintiff): Do you recall anything being said there that time by Mr. Kanape, before he went to bed he had a few drinks?
Mr. Slutsky (attorney for defendant): I object to that. She said she doesn't remember any more of the conversation.
The Court: Maybe he drank coca cola.
Mr. Cochrane: And then his wife woke him up out of bed and grabbed his revolver?
A. I heard it.
The Court: I don't believe her. Tell her I don't believe a word she says.
Mr. Cochrane: She was going to answer.
The Court: I will get her to say anything.
Mr. Cochrane: What is the use of my bringing witnesses."

Illustrative of the treatment by the trial judge of counsel for defendant is this colloquy:

"The Court: This man, I want to say to you in all due deference-- you are not a criminal lawyer, are you?
Mr. Slutsky: No, Judge.
The Court: Any experience?
Mr. Slutsky: No.
The Court: You are calling a man, a defendant in a case who is subject to indictment for murder. On that sort of thing your cross-examination may develop a case that would justify an indictment. None of my business, but this man should be advised of his constitutional rights.
Mr. Cochrane: Let him be advised.
Mr. Slutsky: I object to the man testifying.
The Court: What?
Mr. Slutsky: I object to the defendant being called.

"Inferences are rare and conditions exceptional [illegible] justify the presiding judge in intervening upon his own motion; an extended examination of witnesses, and the exercise of a sound discretion will guide them [illegible] _Dunn v. People_, 147 Ill. 549."

This attitude of the supreme court was illustrated by the [illegible] similar language in _People v. Sternaman_, [illegible] Ill. [illegible], and the principle was held applicable in cases [illegible] a jury in _People v. Hopkins_, 247 Ill. [illegible] were criminal cases, but the reasons for the rule are also applicable to civil controversies.

Generally in the trial of the case [illegible] were made by the trial judge [illegible] since continuously during the case the trial judge spoke in a disrespectful way of the [illegible] in the [illegible]. The following examination of one witness [illegible] is illustrative:

"Mr. Goodness (attorney for [illegible]): [illegible] taking being well [illegible] by Mr. Sharpe, [illegible] had he had a few drinks?

Mr. Gladney (attorney for [illegible]): [illegible]

The court's remarks [illegible] the courtroom.

The court: [illegible] the trial [illegible].

Mr. Goodness: [illegible] and grabbed his [illegible]

A. I [illegible].

The court: [illegible] believe a word [illegible].

Mr. Goodness: [illegible]

The court: [illegible]

Mr. Goodness: [illegible]."

[illegible] of [illegible] by the trial [illegible] for defendant in this language:

"The court: [illegible] difference-- you [illegible]

Mr. Lawler: [illegible].

The court: [illegible]

Mr. Gladney: [illegible]

The court: [illegible] was I [illegible] your cross-examination [illegible] witness [illegible] of his constitutional rights.

Mr. Gladney: [illegible]

The court: [illegible]

Mr. Gladney: [illegible]

The court: [illegible]

Mr. Gladney: [illegible] [illegible].

The Court: My dear sir. That objection is not good. You better get somebody to represent this man who knows something about criminal law. This is a serious matter that you may not realize.

Mr. Slutsky: I am objecting.

The Court: Testify in behalf of the plaintiff?

Mr. Cochrane: I ask that the witness be called.

The Court: He has a right to call him.

Mr. Slutsky: He doesn't have to testify even though he calls him.

The Court: I can't try your case for you. If you don't understand, then call a lawyer and be advised as to when and under what circumstances the man may be required to testify. Get somebody that does. Don't assume the responsibility yourself. Don't assume that responsibility.

Mr. Slutsky: He hasn't the right on the theory he might incriminate himself in this matter.

The Court: I can't have a clinic here and run a law school."

When Mrs. Bobkus testified an interpreter was sworn and the attorney for defendant made inquiry as to the qualifications of the interpreter. The record shows:

"Mr. Slutsky: May I ask how many cases she has acted as an interpreter, Judge?

The Court: Go on. What do you want to ask?

Mr. Slutsky: In how many cases--

The Court: You should have objected before. It is too late.

Mr. Slutsky: I would if the Court wouldn't do all the talking and give someone else a chance."

In the examination of another witness for plaintiff the attorney for defendant made an objection, and the record shows:

"The Court: Overruled. What are you objecting for? I don't want to say something, but I may be required to say something you won't like."

As might be expected in a trial thus conducted, much evidence necessary to a correct determination of the case is not to be found in the record. Evidence of the exact location of the door of defendant's apartment in relation to the hall and the stairway, the condition in which the police found the body upon their arrival and the result of the postmortem is lacking. These parties were entitled to have a fair and impartial trial according to the law of the land. The fact that they were unacquainted with our language

The Court: My dear sir, that objection is not good. You better not somebody is prosecuted and you are the main witness, about criminal law. This is a serious matter that you not realize.

Mr. Hinsky: I am objected.

The Court: Justify is be all of the plaintiff.

Mr. Gerstmann: I am that the [illegible] by [illegible].

The Court: He has a right to call him.

Mr. Hinsky: He haven't been in trouble [illegible] call him.

The Court: I don't [illegible] you. If you don't understand, then call a lawyer and be advised [illegible] what direction the law may be [illegible]. [illegible] body that does. Don't assume the responsibility [illegible]. Don't assume that responsibility.

Mr. Hinsky: He hasn't the right on the [illegible] interrupt [illegible] matter.

The Court: I can't have a [illegible] [illegible] school."

Then Mr. Hinsky [illegible] interrupt the court and the attorney for defendant [illegible] the examinations of the interpreter. The record shows:

"Mr. Hinsky: [illegible] interpreter, Judge?

The Court: Go on. Ones do you [illegible]

Mr. Hinsky: In her [illegible]--

The Court: [illegible] obtained [illegible]. It is too late.

Mr. Hinsky: I avoid if [illegible] talking and [illegible] a [illegible]."

In the examination of witnesses [illegible] the attorney for defendant made an objection, and the record shows:

"The Court: Gerstmann, that was the objection. I don't want to say anything, but I may be [illegible] you don't like."

He might be arrested in a civil [illegible], [illegible] dence necessary to a [illegible] [illegible] found in the record. Evidence of the exact [illegible] of the [illegible] of defendant's [illegible] [illegible] the [illegible], the [illegible] and the result of the [illegible] is a [illegible] entitled to have a [illegible] [illegible] of the law of the land. The [illegible] were [illegible] our [illegible]

would seem to demand that the proceedings be conducted with unusual care, patience and judicial poise. A fair and impartial trial means a trial in which a defendant is permitted to be represented by the counsel whom he has employed to represent him and in which neither witnesses nor counsel are intimidated.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

38570

ROSE C. MALONEY,
Appellee,

vs.

EQUITABLE LIFE INSURANCE COMPANY
OF IOWA, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

284 I.A. 648

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a life insurance policy and upon trial by jury there was a verdict for plaintiff in the sum of $2128, on which the court entered judgment. Defendant appeals from that judgment. At the close of plaintiff's evidence and again at the close of all the evidence, there was a motion by defendant for an instructed verdict, which was denied and which defendant contends should have been given. Defendant also contends that the court erred in giving instructions at the request of plaintiff.

There is practically no dispute as to the facts. The Insurance company issued its policy on the life of James Francis Maloney for the sum of $2,000 on January 23, 1932, and plaintiff was named as beneficiary. The annual premium was $71.98, which by the terms of the policy became due and payable January 23rd in each year. These payments were to continue for twenty years unless the policy was matured by death prior to that time. By the terms of the policy the premiums were due and payable at the home office of the Insurance company, but might be paid to an authorized collecting agent in exchange for receipts signed by the president, vice-president or secretary and countersigned by such agent. The policy also provided:

"Failure to pay any premium or premium note or premium extension agreement when due and payable shall cause this policy to cease and determine, except as hereinafter provided."

The policy provided that the mode of premium payments might be changed on any anniversary of the policy, from annual to semi-annual

JACOB C. KLOCKEY,
Appellee,

vs.

EQUITABLE LIFE INSURANCE COMPANY OF IOWA, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a life insurance policy in the municipal court of Chicago, tried by jury there was a verdict for plaintiff in the sum of $[illegible], on which the court entered judgment. Defendant appeals from that judgment. At the close of plaintiff's evidence and again at the close of all the evidence, there was a motion by defendant for an instructed verdict, which was denied and which defendant contends should have been given. Defendant also contends that the court erred in giving instructions to the jury on behalf of plaintiff.

There is practically no dispute as to the facts. The insurance company issued its policy on the life of Jesse Franklin Klockey for the sum of $[illegible] on January 14, 1921, and plaintiff was named as beneficiary. The annual premium was $[illegible], which by the terms of the policy became due on a specific January 14th in each year. There provisions were in force for twenty years, during which the policy was secured by loans after its first year. By the terms of the policy the premiums were to be paid at the home office or the designated agency, but right is given to an authorized collecting agent in exchange for receipts signed by the president, vice-president or secretary and countersigned by the agent. The policy also provides:

"Failure to pay any premium or loan note or premium extension agreement when due and payable shall cause this policy to cease and determine, except as stated for premiums."

The policy provided that the date of premium payments might be changed on any anniversary of the policy, upon request in semi-annual

or quarterly, or vice versa, but the payment of any premium should not maintain the policy in force beyond the date on which the next payment was due, except as therein expressly provided; that each payment made, whether annual, semi-annual or quarterly, should be considered as fixing the manner in which the subsequent payments were to be made.

The annual premium for the first year in the sum of $71.98 was paid, and when the premium for the second year became due on January 23, 1933, the method of paying the premium was changed so as to make these payments semi-annual. The premium for the first half of 1933, amounting to $37.06, was paid on February 23, 1933. On August 22, 1933, the premium for the second half of the year was paid by making a cash payment to the amount of $23.74 and applying a dividend of $13.32, which had accrued, to the payment of the premium, making a total of $37.06. There was also testimony of plaintiff tending to show that she made the payment at this time and that she then received from defendant a form for her husband to sign, which provided that the dividend, which would become due on the policy the following year, should be applied on the premium to become due in January, 1934. She also testified that the insured signed this request, and that it was returned to defendant.

The semi-annual premium due January 23, 1934, was not paid. The insured died April 7, 1934. February 27, 1934, defendant mailed a letter of that date to the insured, at the head of which appeared the number of the policy and the statement, "lapsed policy." After setting forth sentimental reasons why the policy should not be allowed to lapse the letter concluded:

> "Your Policy in this Company is lapsed, but it may be restored in accordance with the enclosed instructions. Apply for Reinstatement Today!"

Enclosed with this letter was a form request for extension of time for premium payment and also a form for a personal certificate of

or quarterly, or vice versa, but the payment of any premium should not maintain the policy in force beyond the date on which the next payment was due, except as shall be expressly provided; that such payment made, whether annual, semi-annual or quarterly, should be considered as fixing the manner in which the subsequent payments were to be made.

The annual premium for the first year in the sum of $71.09 was paid, and when the premium for the second year became due on January 25, 1923, the method of paying the premium was changed so as to make three payments semi-annual. The premium for the first half of 1923, amounting to $17.09, was paid on February 25, 1923. On August 25, 1923, the premium for the second half of the year was paid by making a cash payment to the amount of $23.77 and applying a dividend of $13.00, which had accrued, to the payment of the premium, making a total of $37.09. There was also testimony of plaintiff tending to show that she made the payment at this time and that she then received from defendant a form to be signed to sign, which provided that the dividend, which would become due on the policy the following year, should be applied on the premium to become due in January, 1924. The jury considered that the insured signed this receipt, but that it was returned to defendant.

The semi-annual premium due January 25, 1924, was not paid. The insured died April 1, 1924. February 27, 1924, defendant sent a letter of that date to the insured, at the head of which appeared the number of the policy and the statement, "Lapsed policy." After setting forth continued reasons why the policy should not be allowed to lapse the letter concludes at:

> "Your policy in this company is lapsed, but it may be restored in accordance with the enclosed instructions. Apply for Reinstatement today."

Enclosed with this letter was a form request for extension of time for premium payment and also a form for a personal certificate of

health for reinstatement, neither of which, however, was ever signed, filled in or returned to defendant. The material part of the request for extension of time for premium payment is as follows:

> "I hereby request the Equitable Life Insurance Company of Iowa to extend the time for payment of the amount due Jan. 23, 1934, under Policy No. 498647, to May 23, 1934, and in consideration thereof, I have this day paid the sum of $13.56--dividend under the following conditions which I hereby agree to: ** "

The conditions in substance are that if the premium was paid before the extended date with interest at the rate of six per cent, credit would be given for the amount paid on the date of the extension with interest at the same rate; that if the death of the insured occurred prior to the extended date and before the premium with interest should have been paid, the premium, less the amount paid, plus interest at six per cent per annum to the date of death, should be considered an indebtedness on account of the policy and would be deducted in any settlement of the policy; that if the premium was not paid on the extended date, the policy should immediately lapse and all rights under the policy should be the same as if the agreement had not been made, except that a nonforfeiture value might be selected within sixty days after the extended date; that if, however, the payment made, plus any subsequent payment made on or before the first extended date was in excess of the sum of one dollar per $1,000, $2.00 for each $10 of monthly income, and on family income policies, $2.00 per $1,000 insurance, for each month of the extension period, the company should continue this extension for such time as the excess payment would permit at the same rates, subject to all the conditions relating to the original extension, but in no event should the entire period of extension, computed from the premium due date, exceed two-thirds of the period covered by the premium; that if the premium was not then paid, any balance over the extension cost at the rates above stated, would be refunded without interest. The

month for reinstatement, waiver of premium, however, was never signed, filled in or returned to defendant. The material part of the request for extension of time for premium payment is as follows:

"I hereby request the Equitable Life Insurance Company of Iowa to extend the time for payment of the second premium, $[illegible], 1974, under policy No. 4[illegible]7, dated [illegible] 13, 1974, and in consideration thereof, I have this day paid the sum of $[illegible] [illegible] under the following conditions which I hereby agree to: [illegible]"

The conditions in substance are that if the premium was paid before the [illegible] date with interest at the rate of six per cent, credit would be given for the amount paid on the [illegible] premium plus with interest at the same rate; that if the death of the insured occurred prior to the extended date and before the premium with interest should have been paid, the premium, less the amount paid, plus interest at six per cent per annum to the date of death, should be considered as in [illegible] on account of the policy and would be included in [illegible] in the policy; that if the premium was not paid on the extended date, the policy should immediately lapse and all rights under the policy should be the same as if the agreement had not been made, except that a nonforfeiture value might be [illegible] within [illegible] the extended date; that if, however, the payment made, plus any nonpaid [illegible] excess of the sum of one [illegible] of month [illegible] insurance, for one month of the policy [illegible] should continue [illegible] extension for [illegible] would occur [illegible] relating to the original extension, that in no event [illegible] period of extension, computed from the premium [illegible], exceed two-thirds of the period covered by the premium; that if the premium was not then paid, any [illegible] the rates above stated, would be included at [illegible] interest. The

form concluded:

"The above request is hereby granted and receipt of the payment on account of the extension is acknowledged, all subject to the conditions above stated.

Equitable Life Insurance Company of Iowa
James W. Hubbell, Secretary
(Printed, not signed)

Countersigned.....

This agreement to be binding on the Equitable Life Insurance Company of Iowa must be counter-signed by an authorized Collecting Agent of the Company."

It was never signed nor the conditions accepted by the insured.

After the death of the insured plaintiff went to the office of defendant in Chicago and was informed that the insurance had lapsed and that nothing was due her. Thereafter, an agent of the company delivered a check to plaintiff for $13.58, dated September 14, 1934, which stated that it was in satisfaction of all claims and demands. She mailed the check back to defendant unendorsed. Upon the trial defendant tendered in open court the sum of $13.58 to plaintiff, but an objection to the tender was sustained. An offer was made by defendant to show that this amount would have paid for insurance up to a certain date, which was before the death of the insured, but an objection to this evidence was sustained. There was also evidence tending to show that the home office of the defendant company in DesMoines, Iowa, recognized in its records the written direction of the insured to apply future dividends to premiums to become due thereafter.

It is the position of plaintiff that the fact that the premium was not paid when due did not render the policy void but only voidable, and she contends also that under the evidence the conduct of the Insurance company was such as to recognize the policy as valid and existing, and that it thereby waived its right to declare a forfeiture and estopped itself from claiming as against her that the policy did not remain in full force and effect. This

Iowa counsel:

"The Judge requests is merely, whether any reason is the payment on account of the extension is established, all matters in the conditions have stated.

Respectfully Life Insurance Company, of Iowa
John T. Merrill, Secretary
(Endorsed, not signed)

Counterclaimed.....

This appears to be binding on the Equitable Life Insurance Company of Iowa under counter-signed by an authorized Contracting Agent of the Company."

It was never signed and the conditions accepted by the insured.

After the death of the insured disability came to the notice of defendant in October and was informed that the insurance had lapsed and that nothing was due. Thereafter, an agent of the company delivered a notice to insurance for Feb. 5, dated September 14, 1924, which stated that it was in satisfaction of all claims and demands. She called the check back to defendant immediately. Upon the trial defendant testified in open court and was of M. to plaintiff, but in cross-examination he said he was mistaken. No offer was made by defendant to show that the amount would have paid for insurance up to a certain date, which was before the death of the insured, but no objection to this evidence was sustained. There was also evidence tending to show that the home office of the defendant company in Cedar Rapids, Iowa, [illegible] in the [illegible] the written discretion of the insured to [illegible] premiums to secure the reinstatement.

It is the contention of plaintiff that the fact that the premium was not paid when due did not render the policy void but only voidable, and the contention also that under the evidence the conduct of the insurance company was such as to indicate the policy is valid and available. [illegible] to insure a reinstatement but that the policy was not [illegible] in fact [illegible] is necessary for the policy to be [illegible] in full force and effect. This

is the controlling question in the case. Plaintiff relies on Chicago Life Ins. Co. v. Warner, 80 Ill. 410. In that case the insurance policy issued June 28, 1870; the annual premium was $25.56, due and payable June 28th of each year. The policy provided that "if the said premiums shall not be paid on or before the days above mentioned for the payment thereof, except as herein provided, then in every such case this policy shall be null and void, and the said company shall not be liable for the payment of the sum assured or any part thereof." The insured died about ten o'clock a. m. June 29, 1872. The premium which fell due on the previous day, June 28th, had not been paid, and on that same day the insured was entitled to receive from defendant company a dividend of $6.40 on the policy. Notice had been sent to the insured on June 1st to the effect that on June 28th the policy would become entitled to this dividend, and that the sum might be used on that day as cash in the payment of the premium, or applied to the purchase of additional insurance payable with the policy. A notice also had been mailed to the insured, stating the date upon which the premium would become due and the amount of it. In another communication sent on July 2nd and addressed to the insured, the insurance company stated that the premium had fallen due on June 28th, and "If you wish to continue this policy in force, you will please remit." A few days thereafter the premium, less the amount of the dividend, was tendered to defendant company and refused. It was clear from the uncontradicted evidence that the company had elected not to forfeit, and the court held that the supposed forfeiture had been in fact waived. The distinction between that case and this is very clear, in that there after the lapse defendant urged the payment of the premium, and that it was tendered to it within a reasonable time.

In Adam v. Columbian Nat'l Life Ins. Co., 218 Ill. App.

in the controlling question in the case. Similar rulings in Chicago life ins. Co. v. Everett, 6 Ill. App. 116. In that case the insurance policy issued June 24, 1870; the annual premium was $24.84, due and payable June 24th of each year. The policy provided that "if the said premiums shall not be paid on or before the days above mentioned (or the grace allowed, namely, ten days) provided, then in every such case this policy shall be null and void, and the said company shall not be liable to the insured or the sum assured or any part thereof." The premium was paid three o'clock P. M., June 24, 1871. The insured died at six on the previous day, June 23rd, and had been sick, and on that same day the insured was notified to remit the first annual premium, a discount of $6.60 on the policy. [illegible] on the insured on June 1st to the effect that [illegible] satisfy himself whether on filed or this lifetime, [illegible] was paid on that day as case in the payment of the premium, or [illegible] the payment of additional insurance [illegible] also had been waived [illegible] the premium would [illegible] the company [illegible] communication sent on July [illegible] insurance company [illegible] 23th, and "if you wish to continue this policy [illegible] please so if." A few days [illegible] of the divided, the [illegible] was clear from the [illegible] elected not to [illegible] failure had been in [illegible] and this is very clear, [illegible] under the payment of the premium, and [illegible] within a reasonable time.

In case v. [illegible] [illegible]

54, the premium of $163 was due on December 6th of each year; tha premium for the year 1911 was not paid on the date it was due. In February thereafter the insured gave and defendant accepted his note for the premium. The insured received a receipt stating that the premium had been "settled this day." However, the note on its face provided that if not paid when due, without grace, the policy should become absolutely null and void "subject to the legal conditions contained therein relating to cash value, paid up and extended insurance and in accordance with the conditions of this agreement without further notice." When this note matured it was extended for a period of sixty days, making it mature August 5, 1912. It was not paid. August 12th defendant's cashier wrote asking insured for a check in payment, and again, on September 20th and October 16th, he wrote similarly urging payment. It also appeared from the evidence that it was the custom of defendant company when the policy was considered as lapsed under such circumstances, to send the notes representing the premiums to the home office, and that this had not been done. Judgment having been entered upon the verdict of a jury, it was reversed and judgment entered for plaintiff in this court, and it was held as a matter of law that under such circumstances the forfeiture of the policy had been waived. The opinion reviewed the authorities and distinguished the case from Roberts v. Aetna Life Ins. Co., 212 Ill. 382; Weston v. State Mut. Life Assur. Co., 234 Ill. 492, and Phoenix Ins. Co. v. Carlock, 32 Ill. App. 255. The court said:

> "While the defendant is not required to affirmatively do some act to accomplish a forfeiture, where it has the right to a forfeiture, it on the other hand will not be permitted to do some act entirely inconsistent with a forfeiture and at the same time claim the forfeiture,--it cannot at one and the same time take the position both that the policy is in force, by demanding payment of the note, representing the premium for the full year, and also that the policy is not in force by refusing to pay the amount it calls for when a loss occurs within that year."

Other cases are cited by plaintiff which it will be un-

84, the premium of $165 was due on December 6th of last year; the premium for the year 1911 was not paid on the date it was due. In February thereafter the insured gave an [illegible] accepted his note for the premium. The insured received a receipt [illegible] that the premium had been "received this day." However, the letter of the [illegible] provided that it [illegible] was, [illegible] should become absolutely null [illegible] "without [illegible] tions sustained therein relating to cash value, [illegible] insurance and to [illegible] without further notice." [illegible] a period of sixty days, [illegible] paid. August 1-th [illegible] check in payment, [illegible] wrote similarly [illegible] that it was the [illegible] adhered to issued under [illegible] ments the previous [illegible] done. Instead [illegible] was received [illegible] it was paid [illegible] forfeiture of the policy [illegible] authorities and [illegible] Ins. Co., 72 Ill. 340; [illegible] Ill. 492, and [illegible] The court said:

"While [illegible] forfeiture, it [illegible] claim the forfeiture, [illegible] position [illegible] the note, [illegible] the policy is [illegible] for which a lapse occurs [illegible]

Other cases are [illegible]

necessary to consider at length, since the cases of Chicago Life Ins. Co. v. Warner and Adam v. Columbian Nat'l Life Ins. Co., supra, most nearly resemble the instant case and are most relied upon by plaintiff. It is elementary that ambiguous language in an insurance contract would be liberally construed in favor of the insured, and the courts of this State in the cases cited have applied that rule.

Defendant cites many cases from other jurisdictions which seem to hold that where accrued dividends are insufficient to pay the full amount of the premium due, the Insurance company is not bound to apply them toward the payment of part of the premium in the absence of any offer by the insured to pay the balance. The cited cases are Blocum v. New York Life Ins. Co., 223 U. S. 364; Weinstein v. Mutual Trust Life Ins. Co., 116 Conn. 654, 166 Atl. 63, 92 A.L.R. 708; Young v. Mutual Trust Life Ins. Co., 54 N. D. 600, 210 N. W. 177, 53 A. L. R. 910; Equitable Life Assurance Soc. v. Pettid, 40 Ariz. 239, 11 Pac. (2d) 833; Price v. Northwestern Mutual Life Ins. Co., (W. Va.) 169 S. E. 613; Cacon v. Mutual Life Ins. Co., (Colo.) 184 Pac. 296, 6 A.L.R. 1395; Eastman, Inc. v. Northwestern Mutual Life Ins. Co., 13 Pac. (2d) 4[illegible]; Terry v. State Mutual Life Ins.Co., (S. Car.) 72 S. E. 498; Bulger v. Washington Life Ins. Co., 63 Ga.328.

While the courts of this State have construed insurance contracts liberally in favor of the insured, they have also recognized the rule that courts have no right to make new contracts for the parties merely because the subject matter thereof is insurance. Looking at the contract upon which this suit is based, there is not a phrase in it which can be construed otherwise than to the effect that it was the agreement of the parties that nonpayment of the premium would terminate it, and obviously the business of insurance could not be transacted on any other basis. Plaintiff's reliance is wholly on the theory of a waiver or estoppal. Her declaration alleges

facts which, it is urged, would if true constitute such waiver or estoppel; but we are not able to find proof of facts in this record which would justify such inference. If we assume (which is not definitely proved) that the dividend of $13.58 was due and payable on January 23, 1934, and that the insured was entitled to have the same applied to the payment of the premium which was then due, and if we further assume that it was so applied, this would not have satisfied the obligation, which by the terms of the contract was $37.06. Payment of only a part could not discharge the obligation to pay the whole. If the retention of the dividend may be regarded as the acceptance of a partial payment (although here again there is no proof tending so to show) this would have extended the policy only until January 23, 1934, and it would have lapsed prior to the death of the insured. It is argued that the retention of the dividend after the death of the insured, with communication of defendant to plaintiff thereafter, was a recognition of the existence of liability under the contract, which amounted to a waiver of the lapse which defendant is now estopped to deny. We find no facts here which justify such inference of waiver nor facts which would form the basis for an estoppel. It is true that a letter from defendant to the insured pointed out benefits and urged the insured to reinstate the policy, but this letter distinctly and clearly stated that the policy had in fact lapsed. By the same letter defendant transmitted to the insured instructions by conformity to which the policy might be reinstated. The inference clearly was that the policy was no longer obligatory upon defendant and would become so only upon compliance with these instructions and conditions. It is true that defendant retained the dividend, but the evidence tends to show that it might reasonably have claimed the right to do so. At no time, as in the cases cited, upon which plaintiff relies, did defendant take the position of insisting on the payment of the

facts which, it is urged, would if true constitute such laches or estoppel; but we are not able to find any such of facts in the record which would justify such inference. If we assume (which it does not definitely prove) that the division of [illegible] and the [illegible] on January 23, 1934, and that the insurer was entitled to have the same applied to the payment of the premium which was then due, and if we further assume that it was so applied, still [illegible] not have satisfied the obligation, which by the terms of the contract was $327.06. Payment of only a part could not [illegible] the obligation to pay the whole. If the retention of the dividend may be treated as the acceptance of a partial payment (although here again there is no proof tending so to show) this would have extended the policy only until January 23, 1934, at which time it would have lapsed prior to the death of the insured. It is argued that the retention of the dividend after the death of the insured, with consequent [illegible] of defendant to plaintiff [illegible], was a recognition of the existence of liability under the contract, which amounted to a waiver of the lapse which defendant is now asserting. We find no facts here which justify such inference or waiver nor facts which would [illegible] the basis for an estoppel. It is true [illegible] further time [illegible] to the insured [illegible] and allowed the insurer to reinstate the policy, but this latter [illegible] clearly [illegible] and the policy had in fact lapsed. By the [illegible] defendant [illegible] to the insured [illegible] by [illegible] so that the policy might be reinstated. The insurance company was not [illegible] so only upon compliance with these [illegible] conditions. It is true that defendant received the dividend, but [illegible] to show that it might reasonably have [illegible] the [illegible]. At no time, as in the cases cited, [illegible] defendant take the position of insisting on the payment of the

balance of the premium as a subsisting obligation. There is not a scintilla of evidence indicating that the unpaid premium was regarded as a debt, which the insured might be compelled to pay. Plaintiff argues strongly for the liability of defendant from the retention of the dividend after defendant had knowledge that the insured was dead. The evidence shows that the insured requested that the dividend should be applied upon the payment of the premium. If we assume that it had not been so applied it would become on the death of the insured a debt due to the administrator of his estate, and there is no proof of any demand by any person entitled to it. Moreover, it was within a reasonable time offered to plaintiff and upon the trial was again offered with interest. The offers were refused. Under the uncontradicted facts and as a matter of law, we hold that the evidence fails to establish either a waiver or an estoppel, and that plaintiff is not entitled to recover.

For these reasons the judgment of the trial court is reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

balance of the premium as a subsisting obligation. There is not a scintilla of evidence indicating that the bonds pending was regarded as a debt, which the insured could be compelled to pay. Plaintiff argues strenuously for the liability of defendant from the relation of the dividend after deducting the amount due the insured was dead. The evidence shows that the insured requested that the dividend should be applied upon the payment of the premium. If we assume that it had been so applied it would become on the death of the insured a part of the insurance of his estate, but there is no proof of any demand by the estate entitled to it. Moreover, it was within a reasonable time offered to plaintiff and upon the terms the policy offered the insurance. The offers were refused. Under the circumstances stated and as a matter of law, we hold that the evidence fails to establish either a waiver or an estoppel, and that plaintiff is not entitled to recover.

For these reasons the judgment of the trial court is reversed.

REVERSED.

Moderwell, P. J., and Gardner, J., concur.

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In Re. ESTATE OF JULIA B. RACKLIFFE,
Incompetent.

AMERICAN NATIONAL BANK AND TRUST
COMPANY OF CHICAGO and ARTHUR AUGUST,
Co-conservators of the Estate of
JULIA B. RACKLIFFE, Incompetent,
Appellees,

vs.

NELLIE KELLER,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

284 I.A. 649

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A petition was filed in the Probate court of Cook county seeking to have a conservator appointed for Julia B. Rackliffe on the ground that she was a distracted person, and also that a conservator be appointed for her estate. There was a verdict and judgment in accordance with the prayer of the petition, and on October 11, 1934, Arthur August and the American National Bank and Trust Company of Chicago were appointed co-conservators of the estate of Julia B. Rackliffe. As a part of the same order, the court found that Nellie Keller had possession of United States liberty bonds of the par value of $18,000 and a check for $815.63 belonging to Julia B. Rackliffe, and it was ordered that Nellie Keller turn over said bonds and check to the co-conservators instanter. Seven days afterward, on October 18th, the conservators moved the court that a rule be entered requiring Nellie Keller to show cause within five days why she should not be adjudged in contempt of court for failure to turn over the liberty bonds in accordance with the order of October 11th. On the same date, October 18th, Nellie Keller filed her special appearance and a petition in which she prayed that the order of October 11th be modified to eliminate the finding that she held the liberty bonds and check and that they be turned over by her to the conservators. The court

In Re. ESTATE OF JULIA E. MACKLIFFE,
Incompetent.

AMERICAN NATIONAL BANK AND TRUST
COMPANY OF CHICAGO and ARTHUR ADLER,
Co-conservators of the Estate of
JULIA E. MACKLIFFE, Incompetent,
Appellees,

vs.

HELLIE SHAWN,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A petition was filed in the probate court of Cook County praying to have a conservator appointed for Julia E. Macklife on the ground that she was a disordered person, and that a conservator is required for her estate. There was a verdict and judgment in accordance with the prayer of the petition, and on October 11, 1937, Arthur Adler and the National Bank of Chicago and Trust Company of Chicago were appointed co-conservators of the estate of Julia E. Macklife. On a hearing of the same order, the court found that Hellie Haller had possession of certain stocks and liberty bonds of the total value of $16,000 and a check for $16.83 belonging to Julia E. Macklife, and it was ordered that Hellie Haller turn over all of these to the co-conservators of the estate. Upon that order, on October 1, the conservators moved the court that a rule be entered requiring Hellie Haller to show cause why she should not be adjudged in contempt of court for failure to turn over the liberty bonds in accordance with the order of October 11th. On the same date, October 19th, Hellie Haller filed her special appearance and a petition in which she prayed that the order of October 11th be modified to eliminate the finding that she had the liberty bonds and stocks and that they be turned over by her to the conservators. She prayed

entered an order denying the prayer of Nellie Keller's petition; it was further ordered that the petition be dismissed. The court also entered an order sustaining the conservators' motion, and Nellie Keller was required to show cause within five days why she should not be adjudged in contempt of court for failure to turn over the liberty bonds to the conservators. Nellie Keller prayed an appeal to the Circuit court from the two orders of October 11th and October 18th and the appeal was allowed upon her giving a bond in the sum of $36,000. Afterward she deposited the bonds with the conservator American National Bank and Trust Co., pending the appeal, and thereupon the Probate court fixed her appeal bond in the sum of $200.

When the case was reached for trial in the Circuit court counsel for Nellie Keller objected to the court hearing the matter on the ground that the Probate court had no jurisdiction because there was no petition or proceeding of any kind in the Probate court against Nellie Keller; that the only proceeding in the Probate court was the proceeding to have Julia B. Rackliffe adjudged to be an incompetent or distracted person, and therefore the Probate court had no jurisdiction to order Nellie Keller to turn over the liberty bonds to the conservators. The Circuit court overruled this contention and ordered a trial de novo.

The theory of Nellie Keller was that the Liberty bonds had been given to her by Julia B. Rackliffe as a gift in June, 1932; that she had been a close friend of Julia B. Rackliffe for a number of years. On the other side, the conservators' position was that the bonds belonged to Julia B. Rackliffe but were physically given by her to Nellie Keller for safe keeping only. The court heard the evidence and found in favor of the conservators. Mrs. Keller appeals.

In the order and judgment of the Circuit court it is recited that the Probate court entered an order on October 11, 1934, in which the Probate court found that Nellie Keller had in her

entered an order denying the prayer of Bessie Bellin's petition; it was further ordered that the petition be dismissed. The court also entered an order allowing the conservators' motion, and Bessie Bellin was required to show cause within five days why she should not be adjudged in contempt of court for failure to turn over the Liberty bonds to the conservators. Bessie Bellin prayed an appeal to the Circuit court from the two orders of October 11th and October 15th and the appeal was allowed upon her giving a bond in the sum of $50,000. Afterward she deposited [illegible] American [illegible] Bank and Trust Co., [illegible] appeal, and thereupon the Probate court fixed her appeal bond in the sum of [illegible].

When the case was reached for trial in the Circuit court counsel for Bessie Bellin [illegible] on the ground that the [illegible] of jurisdiction because there was no petition [illegible] court against Bessie Bellin; [illegible] in the Probate court was the proceeding [illegible] adjudged to be an incompetent [illegible] the Probate court had no jurisdiction [illegible] to turn over the Liberty bonds to the conservators. [illegible] tion and entered [illegible].

The [illegible] and been given [illegible]; that she had [illegible] a number of years. [illegible] the bonds [illegible] by her to [illegible] the evidence [illegible].

In the order and judgment [illegible] cited that the Probate court entered an order [illegible], in which the Probate court found [illegible]

possession liberty bonds of the face value of $18,000 which belonged to Julia B. Rackliffe, incompetent, and that the Probate court ordered them turned over to the conservatorx of Julia B. Rackliffe, incompetent, instanter. The Circuit court further found it had jurisdiction of the parties and of the subject matter, and that by stipulation and agreement between the parties and their counsel, the liberty bonds had been deposited with the conservator American National Bank and Trust Co. as depositary pending the hearing of the matter in the Circuit court. The order of the Circuit court also found that Julia B. Rackliffe had delivered the liberty bonds to Nellie Keller to be held by the latter, but were not given to Nellie Keller as a gift, and that Nellie Keller's appeals should be dismissed. It was ordered and adjudged that the bonds were a part of the estate of Julia B. Rackliffe, incompetent. To reverse this order and judgment Nellie Keller prosecutes this appeal.

The record discloses that September 28, 1934, Arthur August filed his petition in the Probate court of Cook county alleging that Julia B. Rackliffe was a distracted person and incompetent to manage her estate and praying that a conservator be appointed. Summons was issued against Mrs. Rackliffe, returnable October 3, 1934. She was duly served, and Nellie Keller was served with a subpoena requiring her to appear as a witness in the matter on October 3rd. When the matter was reached by the Probate court on that date the court stated he would be unable to hear any matter that was to be contested. Clarence F. Martin, attorney at law, appeared at that time, as did Nellie Keller. Mrs. Rackliffe was not there. Martin stated that he was representing Mrs. Rackliffe. There is a dispute in the evidence in the instant case as to whether he also stated that he represented Nellie Keller. The Probate court set the petition for hearing on October 10th, Mr. Martin stating he had not as yet conferred with Mrs. Rackliffe. Thereupon, counsel for petitioner stated it had come to

possession illegally made of the face value of $3,000 which belonged to Julia E. Meadlite, incompetent, and that the trustees had endorsed them turned over to the conservatrice of Julia E. Meadlite, incompetent, instead. The circuit court further found it had jurisdiction of the parties and of the subject matter, and that by stipulation and agreement between the parties and their counsel, the liability funds had been deposited in the court's for safekeeping in the Bank and Trust Co. to be ultimately paid to the owner of the circuit court. The order of the circuit court also found that Julia E. Meadlite had delivered the liberty bonds to Willie Meller to be held by the latter, but were not given to Willie Meller as a gift, and that Willie Meller's property should be delivered. It was ordered and adjudged that the bonds belonging to the estate of Julia E. Meadlite, incompetent, be turned over and delivered to Willie Meller forthwith.

The record discloses that on [illegible], Willie Meller filed his petition in the [illegible] court in Cook County, alleging that Julia E. Meadlite was a [illegible] person and incompetent to manage her estate and praying that a conservator be appointed. Hearing was issued against Mrs. Meadlite, [illegible]. She was duly served, and Willie Meller [illegible] requesting her to appear as a witness [illegible]. Upon the matter was received in the [illegible] court stated he would be [illegible] in the [illegible] of [illegible].

Charles E. Martin, attorney [illegible], testified he did [illegible] the [illegible]. Mrs. Meadlite [illegible] was represented by Mrs. Meadlite. [illegible] in the instant case [illegible] Willie Meller. The trustee [illegible] October 1928, Mr. Martin stating he was not [illegible] Meadlite. Therefore, counsel for petitioner [illegible] to

their knowledge that Nellie Keller had liberty bonds of the face value of $18,000 belonging to Mrs. Rackliffe and that the court should enter an order impounding them. Thereupon Mr. Martin, as he testified in the instant case, stated: "Judge O'Connell said, 'I don't think I have the right to enter that order.' And at that time I stated, 'Your Honor, those bonds are in possession of Mrs. Keller, who has admitted to me that she has them. I don't think there is any necessity for impounding them. She admitted possession of the bonds and they will be there for any -- awaiting any further order that might be entered in this case.'"

Frank J. Jacobson and Samuel L. Cohen, who apparently represented the petitioner in the Probate court, testified in the instant case before the Circuit court as to what took place on October 3rd before the Probate court. Jacobson testified that when the question of impounding the bonds was brought up in the Probate court Mr. Martin stated: "I am representing Mrs. Keller. She retained our office to represent her in this matter. Mrs. Keller has those bonds and is keeping them *** for Mrs. Rackliffe and I guarantee this Court that there will be no change in the status of the situation until this contest day. Therefore, there is no necessity of impounding the bonds." Cohen testified: "I heard a statement by an attorney that he was representing Mrs. Keller. I believe his name is Clarence E. Martin. I know he offices with Master in Chancery Hales; I saw him up in that office. I heard a further statement as to the fact that Mrs. Keller had $18,000 in Liberty bonds and was taking care of them for Mrs. Rackliffe."

The matter was then postponed by the Probate court to October 10th at which time Mrs. Rackliffe and Mrs. Keller, who was again subpoenaed as a witness, appeared with attorney Martin and the matter was heard before Judge McEwen and a jury. There was in reality no contest; the jury returned a verdict finding Mrs. Rackliffe was a distracted person, incapable of managing her estate and that she was

their knowledge that Kelly Keller had illegally taken of the face value of $13,000 [illegible] is are. Hawkins and that the court should enter an order impounding them. Thereupon Mr. Martin, as he testified in the instant case, stated: "Judge O'Connell said, 'I don't think I have the right to enter that order.' And at that time I stated, 'Your honor, these bonds are in [illegible] of Mrs. Keller, who was entitled to be [illegible] them. I don't think there is any necessity for impounding them. My [illegible] possession of the bonds and they will be there for [illegible] -- [illegible] order that prior to entered in this case."

Frank G. Hawkins and [illegible] G. Cohen, who [illegible] represented the petitioner in the [illegible] case, testified in instant case before the Illinois court as to what [illegible] before the trial court. [illegible] the question of impounding the bonds was [illegible] Martin, [illegible] this stated: "I did [illegible] Mr. [illegible] to represent her in this matter. [illegible] and is keeping them for her. Hawkins and I [illegible] there will be no [illegible] until this contest by. [illegible] impounding the bonds." [illegible] Martin [illegible] he was [illegible] Keller. [illegible] Martin. I [illegible] up in this [illegible] Mrs. Keller had [illegible] for her. [illegible]."

[illegible] Judge [illegible] was again [illegible] the matter was [illegible] contest; the jury returned a verdict [illegible] a distinguished person, incapable of managing her affairs and [illegible]

about seventy-four years of age. Thereupon, the question came up as to who should be appointed conservator or conservators, and Judge McEwen referred this matter to Judge O'Connell of the Probate court, and the parties thereupon appeared before Judge O'Connell in chambers, who stated he would appoint the petitioner, Arthur August, and the American National Bank and Trust Co. co-conservators, and that an order should be prepared and submitted the next day. The order was prepared by counsel for petitioner and a copy given to Mr. Martin on that date.

The next day, October 11th, the same counsel appeared before Judge O'Connell; the order was submitted and entered. By that order the court appointed August conservator of the person, and the bank of the estate, of Julia B. Rackliffe, who was found by the jury to be a distracted person, and it was ordered that Nellie Keller turn over the liberty bonds to the conservators instanter. Shortly after this Mrs. Keller retained attorney Hales to represent her, and about October 16th he caused notice to be served on counsel for the conservators that he would file a special appearance on behalf of Mrs. Keller and that he would ask that the provision in the order of October 11th, ordering Mrs. Keller to turn over the bonds to the conservators be eliminated. About the same time counsel for the conservators served notice that they would ask that a rule be entered against Mrs. Keller to show cause why she should not be adjudged in contempt of court for failure to turn over the bonds to the conservators, as the order of October 11th provided. These two motions came before the Probate court on October 18th, and on that date the court entered two orders, as before stated.

May 11th, 1935, seven months after the appeal was taken, the matter came on for hearing before the Circuit court. Counsel for Mrs. Keller objected to the hearing of the case on the ground that the Probate court had no jurisdiction of Mrs. Keller and there-

about seventy-four years of age. Therefore, the question came up as to who would be appointed conservator or conservatrix, and Judge Bedwell referred this matter to Judge O'Donnell of the Probate Court, and the petition thereupon appeared before Judge O'Donnell in chambers, who stated he would appoint the petitioner, Arthur Murray, and the American National Bank and Trust Co. co-conservatrix, and that an order should be prepared and submitted the next day. The order was prepared by counsel for petitioner and a copy given to Mr. Martin on that date.

The next day, October 11th, the same counsel appeared before Judge O'Donnell; the order was submitted and entered. By that order the court appointed August conservator of the person, and the best of the estate, of Julia E. Rheinlite, who was found by the jury to be a distracted person, and it was ordered that said Julia Lynn over the liberty bond to the conservator jointly. Shortly after this Mrs. Keller retained attorney Gal— to represent her. On October 14th he caused notice to be served on counsel for the conservatrix that he would file a special appearance on behalf of Mrs. Keller and that he would ask that the provision in the order of October 11th, ordering Mrs. Keller to turn over the bonds to the conservatrix be eliminated. There [illegible] for the conservatrix served notice that they would ask [illegible] be entered against Mrs. Keller to show cause why she should not be adjudged in contempt of court for failing to turn over the bonds to the conservatrix, as the order of October 11th [illegible]. These two motions came before the Probate Court on October 16th, on that date the court entered the orders, as before stated.

May 11th, 1920, seven months after the motions had been [illegible], the matter came on for hearing before the [illegible] court for Mrs. Keller objected to the hearing at the time on the ground that the Probate Court had no jurisdiction of Mrs. Keller and there-

fore the order of that court, requiring her to turn over the bonds, was void. The contentions advanced were that no petition or pleading of any kind was filed in the Probate court, nor was there any affidavit filed in that court as required by Section 53, chap. 86, Ill. State Bar Stats. 1935; that Mrs. Keller was not represented in that court - and on the further ground that no witnesses had been sworn in the Probate court on the question of the ownership of the bonds, and since the Probate court had no jurisdiction, the Circuit court likewise had no jurisdiction. Thereupon, counsel for the conservators stated to the court that Mrs. Keller was personally before the Probate court on October 3rd and 10th, and was represented by Mr. Martin, and Mr. Martin there stated that Mrs. Keller held the bonds for Mrs. Rackliffe, and that she would hold them subject to the order of the Probate court.

The Circuit court then overruled the contention of counsel for Mrs. Keller and stated the Probate court had jurisdiction, but that in any event he could determine that question on the hearing; that under the law the trial would be de novo, and that the ownership of the bonds could be fully gone into. The hearing then proceeded and counsel for Mrs. Keller called four witnesses, William H. Davis, Mrs. Keller, her husband, and Mr. Clarence F. Martin, the attorney. The testimony of Mr.and Mrs. Keller and Mr. Davis was to the effect that some time about June, 1932, Mrs. Rackliffe, who was a close personal friend of Mrs. Keller for a great many years, gave the bonds to Mrs. Keller, stating that they were Mrs. Keller's, but that when the interest came due on them it should be collected by Mrs. Keller and given to Mrs. Rackliffe; that Mrs. Keller had kept the bonds in her possession ever since that time.

Mr. Martin testified that he did not represent Mrs.Keller on October 3rd or 10th, or any other time, but that he represented Mrs. Rackliffe.

fore the order of that court, requiring her to turn over the income, was void. The contentions advanced were that no petition or pleading of any kind was filed in the probate court, nor was there any affidavit filed in that court as required by section 52, chap. 96, Ill. State Bar Stats. 1935; that Mrs. Keller was not represented in that court - and on the further ground that no witnesses had been sworn in the Probate court on the question of the sufficiency of the bond, and since the Probate court had no jurisdiction, the Circuit court likewise had no jurisdiction. Therefore, counsel for the conservators stated to the court that Mrs. Keller was personally before the Probate court on October 3rd and 10th, and was represented by Mr. Martin, and Mr. Martin there stated that Mrs. Keller had the bonds for sale. Accordingly, and that she would hold them subject to the order of the Probate court.

The Circuit court then overruled the contention of counsel for Mrs. Keller and granted the Probate court had jurisdiction, but that in any event he could determine that question on the hearing; that under the law the Oral would be in order, [illegible] probable of the bonds would be fully protected. The Courts, then proceeded and overruled for Mrs. Keller - [illegible] attorney, William A. Davis, Mrs. Keller, her husband, and Mr. Clarence L. Martin, the attorney. The testimony of Mrs. Keller and [illegible] Davis was to the effect that some time about June, 1932, Mrs. Mackrille, was a close personal friend of Mrs. Keller, [illegible] gave the bonds to Mrs. Keller, [illegible] but that when the interest came due on them it had be collected by Mrs. Keller and given to Mrs. Mackrille; that Mrs. Keller had kept the bonds in her possession [illegible].

Mr. Martin testified [illegible] Keller on October 3rd or 10th, [illegible] Mrs. Mackrille.

The evidence further shows that Mrs. Keller had been subpoenaed as a witness on October 3rd and again on October 10th and that in response she was in the Probate courton each of these dates. Mr. Martin further testified that Mrs. Rackliffe told him she had given the liberty bonds to Mrs. Keller. He further testified, as above quoted, that when on October 3rd the question of impounding the bonds was brought up by counsel for the petitioners, when it was stated to the court that the bonds were in possession of Mrs. Keller, he thought it was not necessary to impound them since Mrs. Keller admitted she had them in her possession and would hold them awaiting the further order of the court.

At the conclusion of the testimony of these witnesses, which was on May 11th, the case was continued until May 14th at two o'clock p. m. When the hearing was resumed on the latter date counsel for defendant again objected to the court continuing with the hearing on the same grounds advanced by him when the case was called on the 11th, but the court ordered the hearing to proceed. The conservators then called witnesses, two of whom were the counsel who appeared before the Probate court on behalf of the petitioners, who testified that at that time Mr. Martin stated he was representing Mrs. Keller and that on October 10th he represented Mrs. Keller, who was keeping the bonds for Mrs. Rackliffe. A court reporter was also called as a witness. He testified that on September 26, 1934, on the hearing before a master in chancery of a bill filed by Mrs. Rackliffe to remove a cloud from the title to her home, he took the testimony before a master. He then read from the transcript of the testimony given by Mrs. Keller and Mrs. Rackliffe at that time, which showed that Mrs. Keller stated before the master that she had the $18,000 liberty bonds which she was keeping in a safety deposit box for Mrs. Rackliffe, at the request of Mrs. Rackliffe. Further evidence was offered on behalf of the conserva-

The evidence further showed that Mrs. Ka'ai had been subpoenaed as a witness on October 3rd and again on October 1 in and that in response she was in the prosecutor's office on these dates. Mr. Martin further testified that Mrs. Kawahitele told him she had given the liquor bottle to Mrs. Ka'ai. The further testified, as above quoted, that then on October 1st the question of impounding the bottle was brought up by counsel for the defendants, when it was stated to the court that the bottle was in possession of Mrs. Kalior, so thought it was not necessary to impound the liquor Mrs. Kalior admitted she had then in her possession and would hold them subject the further order of the court.

At the conclusion of the testimony of these witnesses, which was on May 11th, the case was continued until May 16th at two o'clock p. m. When the hearing was resumed on the former date counsel for defendant moved a verdict in the court excluding all the evidence on the same grounds advanced by him. The case was called on the 11th, but the court ordered the witnesses to present.

The conservators then called witnesses, one of whom was the counsel who appeared before the Probate Court on behalf of the petitioners, who testified that at that time, after which he was professedly Mrs. Kalior and Mrs. Kawahitele, Mrs. Ka'ai, who was acting the same for Mrs. Kawahitele. The court reporter was also called as a witness. He testified that on September 26, 1921, on the hearing before a master in chancery of a bill filed by Mrs. Kawahitele to remove a cloud from the title to her home, a copy of the testimony before a master. He then read the transcript of the testimony given by Mrs. Kalior or Mrs. Kawahitele at that time, which showed that Mrs. Kalior stated before the master that she had the $14,000 liquor bottle which she was keeping in a safety deposit box for Mrs. Kawahitele, at the request of Mrs. Kawahitele. Further evidence was offered on behalf of the petitioners

tors tending to show that the bonds belonged to Mrs. Rackliffe.

Section 53 of chap. 86 provides that "If any conservator appointed pursuant to this Act or any other person interested in the ward or his estate, or any other person, shall state upon oath to any County court, that he believes that any person has in his possession or control" property "belonging to the ward, *** the court shall require such person to appear before it by citation, and may examine him on oath, *** (may hear) and other evidence offered by either party, and make such order *** as the case may require.

"The court shall have power to hear, settle and adjudge all controverted questions of title and claims *** in relation to personal property and to determine the right of property upon the demand of either party. Such questions of title and rights of such property, and such claims *** shall be determined by trial by a jury of six persons if either party so requests."

The conventional procedure under this section is to file a petition in the Probate court for a citation against the person that is supposed to have any property belonging to the estate of the ward, but we think it is not necessary to follow this procedure if one appears in court and admits that he holds property belonging to the estate of the ward.

In construing this section this court in Estate of Johnson v. Kilpatrick, 250 Ill. App. 416, said: "It has been frequently held that proceedings in the probate court like the one in question are not suits at law, but are purely statutory proceedings in which written pleadings are not required and the proceedings are not governed by the technical rules which apply to suits at law. 'No formal particularity is required to give the court jurisdiction. (Blair v. Bennett, 134 Ill. 78)'. (Martin v. Martin, 170 Ill. 18, 24.) In fact, as we read it, paragraph 54, (sec. 53) does not even

require that the oath upon which the citation must be based shall be in writing."

In the instant case there was evidence, as above stated, that when Nellie Keller appeared in the Probate court October 3rd, she having been subpoenaed as a witness, she was represented by counsel and admitted that she held the bonds which belonged to Mrs. Rackliffe. It is true there is evidence that she did not make such admission and that she was not represented by counsel, but the Probate court entered an order directing her to turn over the bonds to the conservators; and the Circuit court in the instant proceeding heard the conflicting evidence as to what took place before the Probate court. He found in favor of the conservators' contention and we are of opinion that we would not be warranted in disturbing the finding on this question. And especially is this so when the stenographic report taken before the master in chancery is to the effect that Mrs. Keller there admitted she held the bonds for Mrs. Rackliffe.

We are of opinion that the question of the ownership of the bonds was a question of fact for the trial court to determine. He saw and heard the witnesses testify and was in a much better position to determine the truth of the matter in controversy than are we in a court of review where we have but the printed page before us. He found in favor of the conservators and we are unable to say that his finding is against the manifest weight of the evidence.

While the judgment entered by the court ordered that the appeal of Mrs. Keller be dismissed, yet a reading of the entire judgment order is that the bonds belonged to Mrs. Rackliffe's estate and they were awarded to her conservators. It was error to order the appeal dismissed but such a recitation in the judgment order is merely an irregularity.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., concurs.

Matchett, J., dissents. (See next page.)

require that the oath upon which the citation must be based shall be in writing."

In the instant case there was evidence, as above stated, that when Julia Keller appeared in the probate court October 3rd, she having been subpoenaed as a witness, she was represented by counsel and admitted that she held the bonds which belonged to Mrs. Rockliffe. It is true there is evidence that she did not make such admission and that she was not represented by counsel, but the probate court entered an order directing her to turn over the bonds to the conservatrix; and the Circuit court in the instant proceeding heard the conflicting evidence as to what took place before the probate court. We found in favor of the conservatrix' contention and we are of opinion that we would not be warranted in disturbing the finding on this question. And especially is this so when the circuit court taken before the matter in chancery as to the effect that Mrs. Keller there admitted was still the bonds of Mrs. Rockliffe.

We are of opinion that the question of the ownership of the bonds was a question of fact for the trial court to determine. He saw and heard the witnesses locally and was in a much better position to determine the truth of the matter in controversy than are we in a court of review where we have but the printed page before us. He found in favor of the conservatrix and we are unable to say that his finding is against the manifest weight of the evidence.

While the judgment entered by the court ordered that the appeal of Mrs. Keller be dismissed, yet a reading of the entire judgment order in that regard indicates to us, Chancellor's intents and they were entered as for convenience. It was error to order the appeal dismissed but such error [illegible] the judgment order is merely an informality.

The judgment of the circuit court of cook county is affirmed.

Affirmed.

McBride, P. J., concurs.

Matchett, J., dissents. (See next page.)

38438 MR. JUSTICE MATCHETT dissenting.

The facts are well stated in the opinion of the court, and I shall not repeat. I dissent because I am convinced, in the first place, that the Probate court was wholly without jurisdiction of the controversy between the conservators and Mrs. Keller; and, in the second place, that the Circuit court could not upon appeal exercise any power save that which the Probate court could or should have exercised while the matter was there pending. Snyder v. Snyder, 142 Ill. 60; Estate of Johnson v. Kilpatrick, 250 Ill. App. 416; In re. Estate of Lalla, 281 Ill. App. 128, are only a few of the numerous cases which might be cited to the second proposition. As to the first proposition, the proceeding was authorized and the court had jurisdiction only under section 53 of chapter 86 (Ill. State Bar Stats., 1935, par. 54.) The proceeding is purely statutory. I had supposed it to be elementary that compliance with statutory requirements was in such matters a condition precedent to jurisdiction by the court.

I think it was the intention of the legislature in the enactment of section 53 that the oath upon which the citation was based should be in writing, notwithstanding the dictum cited to the contrary in the Johnson case. The appearance of Mrs. Keller in the Probate court on October 3rd was in response to a subpoena. She was not a party to any proceeding, and she was privileged while in attendance in response to the subpoena. The entry of a judgment against the witness under such circumstances, arbitrary and without prior notice of any claim is, as it seems to me, a dangerous precedent. The bonds, concerning which findings were entered in the Circuit court, are nowhere described with the certainty necessary to identification, and the final judgment of the Circuit court, dismissing the appeal, leaves supposed issues, as it seems to me, unadjudicated.

30439 VI. JUDICIAL ACTUARY DISCRETION.

The facts are well stated in the opinion of the court, and I shall not repeat. I discard because I do not believe, in the first place, that the probate court was ever without jurisdiction of the controversy between the conservators and the widow; and, in the second place, that the circuit court could not upon appeal exercise any power save that which the probate court could or should have exercised while the matter was there pending. Mudge v. Snyder, 128 Ill. 65; Adams of Johnson v. Kilgarlin, 18 Ill. App. 418; In re. Estate of Smith, 98 Ill. App. 123, are only a few of the numerous cases which might be cited to the second proposition. As to the first proposition, the proceeding was authorized and the court had jurisdiction fully under section 23 of chapter 35 (Ill. Stats. Ann. Stats., 1874, sec. 24.) The pleading is purely statutory. I was surprised to see it seriously that compliance with statutory requirements was in some instances a condition precedent to jurisdiction by the court.

I think it was the intention of the legislature in the enactment of section 23 of the civil code, with the exception was based mainly on its wording, restricting the claims listed to the contrary in the common case. In accordance of the matter in the probate court on notice that was in response to a subpoena, the was not a party to any proceeding, and was merely legal entity in attendance in response to the subpoena. The entry of a judgment against the widow under the circumstances, certainly and without prior notice of any claim to, as it was in a, a judicial proceeding. The court, considering which jurisdiction was exercised in the circuit court, was merely determining (1) the administrator necessary to identification, and (2) the time, and of the original suit, discharge the widow, leaving matters as, in fact, as, unadjudicated.

38508

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. OSCAR NELSON, as Auditor of
Public Accounts of the State of
Illinois,
Complainant,

vs.

UNION BANK OF CHICAGO et al.,
Defendants.

CHICAGO REALTY FINANCE COMPANY,
a Corporation,
Intervening Petitioner-Appellee,

vs.

OAK PARK TRUST & SAVINGS BANK, a Corporation, Individually and as Trustee,
G. WILLIAM CHRISTOPH, HENRY F. LAWRENCE,
UNION BANK OF CHICAGO, a Corporation, as
Trustee under Trust No. 3710,
Respondents.

OAK PARK TRUST & SAVINGS BANK, a Corporation,
Individually and as Trustee,
Respondent-Appellant.

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

284 I.A. 649

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Auditor of Public Accounts filed suit against the Union Bank of Chicago to have its affairs wound up on account of insolvency. From time to time thereafter a number of intervening petitions were filed, among them being one by the Chicago Realty Finance company, a corporation, and another by the Oak Park Trust & Savings Bank, a corporation, individually and as trustee. It was claimed that the Union Bank of Chicago, while it was conducting its business, held certain real estate contracts and moneys collected by it on such contracts as trustee, the Chicago Realty Finance Company and the Oak Park Trust & Savings Bank, individually and as trustee, sought to have their respective claims enforced against the funds collected by the Union Bank of Chicago, and later by the Oak Park Bank, which succeeded the Union Bank. The matter was referred to a master in chancery who found in favor of the Finance company, and it was decreed that $6026.99, which had been

PEOPLE of the STATE OF ILLINOIS,
ex rel. OSCAR E. NELSON, as Auditor of
Public Accounts of the State of
Illinois,

Appellant,

v.

UNION BANK & TRUSTS et al.,

Appellees.

CHICAGO NEAR-NORTH PROPERTIES COMPANY,
a Corporation,

Intervening Petitioner-Appellee,

v.

OAK PARK TRUST & SAVINGS BANK, a corporation, Trustee under Trust No. 6111,

Intervening Petitioner-Appellee.

OAK PARK TRUST & SAVINGS BANK, a corporation,
Individually and as Trustee,

Petitioner-Appellee,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellant.

The director of public [illegible] union bank of [illegible] to give its [illegible] insurance. Upon [illegible] petitions were filed, among [illegible] Florence [illegible], a corporation, [illegible] a [illegible] trust, [illegible]. It was alleged that the [illegible] its business, [illegible] located by it on [illegible] Florence [illegible] and as trustee, [illegible] against the [illegible] by the [illegible] was refused to a [illegible] Florence [illegible]

collected by the Union Bank of Chicago and was in possession of the receiver of the bank, were trust funds, and that the Finance company "is entitled to the pro-rata distribution of all of the assets under the said Trust Company act in the hands of the Auditor of Public Accounts of the State of Illinois, and if said assets, *** are insufficient to pay the full amount of said claims, the Intervening Petitioner, Chicago Realty Finance Company, shall have a preferred claim for the balance due to be paid to it proratably with all claims in due course of administration, and that Oak Park Trust & Savings Bank, individually and as trustee, *** G. William Christoph and Henry F. Lawrence, (two other intervenors claiming such trust funds) are forever barred from making any claims thereto."

It was further decreed that the Oak Park Bank, within ten days pay to the Finance Co. $3,075.25, (which sum it had collected on the real estate contracts) with interest thereon, at the rate of 5% per annum from November 21, 1934, and that in default thereof a judgment for that amount be entered against it individually and as trustee. It was further decreed that the Oak Park Bank, from time to time pay to the Finance company, from collections made by the Oak Park Bank on the real estate contracts hereinafter mentioned, the Finance Co's pro-rata share of such collections. To reverse this decree the Oak Park Bank prosecutes this appeal.

The record discloses that in 1930 G. William Christoph and Claude C. Niles owned or had an interest in real estate located in DuPage county, Illinois, on which there was a mortgage of about $25,000. They desired to sell the lots, and for that purpose, on March 21, 1930, turned the sale of them over to H. O. Stone, Subdividers, Inc., and on the same day they authorized The Guardian National Bank of Chicago to sign contracts for the sale of lots in the subdivision and to receive the money paid by the purchasers of the lots, and authorized The Guardian Bank to pay a commission of 40% of the sale price to Stone & Company for its services, such

collected by the Union Bank of Chicago and was in possession of the receiver of the bank, were trust funds, and that the finance company "is entitled to the pro-rata distribution of all of its assets under the said trust company act in the hands of the auditor of Public Accounts of the State of Illinois, and if said assets, are insufficient to pay the full amount of said claims, the intervening Petitioner, Chicago Realty Finance Company, shall have a preferred claim for the balance due to be paid to it proratably with all claims in due course of administration, and that the Park Trust & Savings Bank, individually and as trustee, and G. William Christopher and Henry A. Lawrence, (two other intervenors claiming such trust funds) are forever barred from making any claims thereto."

It was further decreed that the Park Bank, within ten days pay to the finance co. $2,070.[illegible], (which was it had collected on the real estate contracts) with interest thereon, at the rate of 5% per annum from November 21, 1934, and that in default thereof a judgment for that amount be entered against it individually and as trustee. It was further decreed that the Park Bank, from time to time pay to the finance company, from collections made by the Park Bank on the real estate contracts hereinafter mentioned, the Finance Co.'s pro-rata share of such collections. To reverse this decree the Park Bank prosecutes this appeal.

The record discloses that in 1926 G. William Christopher and Gladie G. Bitler owned or had an interest in real estate located in DuPage county, Illinois, on which there was a mortgage of about $22,000. They desired to sell the lots, and for that purpose, on March 23, 1930, formed the sale of them over to R. G. Bitler, Subdividers, Inc., and on the same day they authorized the American National Bank of Chicago to sign contracts for the sale of lots in the subdivision and to receive the money paid by the purchasers of the lots, and authorized the American Bank to pay a commission of 10% of the sale price to Grove & Company for its services, from

commissions to be paid as follows: "One-half of the initial or down payment and one-half of all collections thereafter until the sum equals forty (40%) per cent of the purchase price.

"This amount is to be paid to H. O. Stone & Co. not later than the 5th day of each month."

Some time afterward The Guardian National Bank was succeeded by the Union Bank of Chicago to act in the matter, and later, after the suit was filed by the Auditor of Public Accounts against the Union Bank of Chicago, it, in turn, was succeeded by the Oak Park Bank.

The record further discloses that the Oak Park Bank held the $25,000 mortgage on the land in DuPage county as collateral security for an indebtedness owed to the bank and the Bank was authorized to apply payments received from the real estate toward the liquidation of the mortgage, so that it has been reduced to $10,746.76 still due.

The decree found that H. O. Stone & Co. sold lots of the property in question for a total price of $61,733 upon which its commission amounted to $24,693.20; that H. O. Stone & Co. had been paid on account of this commission from moneys collected from the purchasers, $7,848.25, leaving a balance due Stone & Co. of $16,844.95, payable only out of the moneys as collected.

The interest of Niles in the real estate was assigned and transferred to Henry F. Lawrence and the decree found that the Oak Park Bank was the assignee of the beneficial interest in the property and assets of Christoph and Lawrence, and that the bank was the holder of the mortgage on the premises, on which there was $10,746.76 unpaid, and that one-half of the proceeds of the moneys collected from the sale of the property was to be applied toward the liquidation of the mortgage.

The evidence shows that $27,308.13 was paid on account of

commissions to be paid as follows: "One-half of the initial or down payment and one-half of all collections thereon for which the sum equals forty (40%) per cent of the purchase price.

"This account is to be paid to G. Stone & Co. not later than the 5th day of each month."

Some time afterward the Guaranty Building was the security needed by the Union Bank of Chicago to get in the matter, and later, after the suit was filed by the auditor of public accounts against the Union Bank of Chicago, it, in turn, was succeeded by the Oak Park Bank.

The second further insurance was the two 2nd mortgages the $25,000 mortgage on the land in question was insufficient security for an indebtedness even to the Bank and the Bank was authorized to verify payments received from the real estate toward the liquidation of the mortgage, so that it was reduced to $20,740.70 still due.

The Chicago Trust Bank, G. Stone & Co. held 10% of the property in question for a value of $21,700 upon which the commission amounted to $24,000.00; that G. W. Stone & Co. had been paid on account of this commission from moneys collected from the purchasers, $7,000.00, leaving a balance due him of $16,984.00, payable only out of the moneys as collected.

The interest obtained by the Trust Bank was assigned and transferred to Harry A. Stone by the Chicago Trust Bank and the Oak Park Bank was assigned to the Chicago Trust Bank. Initially in the property was placed a value of $[illegible] by the lawyer, [illegible] was the notice of the mortgage on the property, in which [illegible] $20,740.70 should, and that mortgaging the property [illegible] collected from the sale in the property [illegible] the liquidation of the mortgage.

The evidence shows that Mr. [illegible] was guilty in connection of

the purchase price of the lots sold by Stone & Co. One-half of this sum or $13,654.06 was due to H. O. Stone & Co. for its commissions. And the account showing the collections and distributions from the proceeds of the sale of the lots shows that Stone & Co. paid commissions amounting to $7612.75. This is at variance with the amount found due in the decree to have been paid Stone & Co., viz., $7,848.25, or a difference of $235.50. We are unable to account for this slight discrepancy, which is in favor of the Oak Park Bank, and the Finance company makes no complaint.

The evidence further showed that after the contracts were turned over to the Oak Park Bank it collected on account of the purchase price of the lots, "as of November 21, 1934, $7,971.48, and that the said pro-rata share therein of the Chicago Realty Finance Company is $3,075.25; that said Oak Park Trust and Savings Bank has paid out all the said funds collected except the balance on hand as of November 21, 1934, of $426.10; that said funds should have been held for Chicago Realty Finance Company and that said Oak Park Trust & Savings Bank should also account and pay over to Chicago Realty Finance Company its pro-rata share of all moneys received after November 21, 1934, in accordance with the terms of said instruments dated March 21, 1930."

It appears from the foregoing that the receiver of the Union Bank has in his possession $6,026.99, which the decree ordered be paid to the Finance company. And the Oak Park Bank, individually and as trustee, was ordered to pay to the Finance company $3,075.25, the amount of these two items theretofore collected from the sale of the lots made by Stone & Co., and whose claim to such commissions now belongs to the Finance company.

The decree from which the appeal is prosecuted was entered by the Circuit court of Cook county July 13, 1935. That decree modified a decree entered in the cause May 3, 1933, in which last

the purchase price of the lots sold by Stone & Co. the-last of this was or $13,673.06 was due to S. O. Stone & Co. for its commissions. And the account showing the collections and distributions from the proceeds of the sale of the lots shows that Stone & Co. paid commissions amounting to $7013.73. This is at variance with the amount found due in the decree to have been paid Stone & Co., viz., $7,464.73, or a difference of $338.00. We see no way to account for this slight discrepancy, which is in favor of the Park Bank, and the Finance company makes no complaint.

The evidence further showed that after the contracts were turned over to the Park Bank it collected on account of the purchase price of the lots, "as of November 23, 1924, $7,871.42, and that the said pro-rata share towards of the Chicago Reality Finance Company is $1,573.28; that said the Park Trust and Savings Bank has paid out all the said funds collected except the balance on hand as of November 23, 1924, of $298.14; that said funds should have been held for Chicago Reality Finance Company and that said Park Trust & Savings Bank should give account and pay over to Chicago Reality Finance Company its pro-rata share of all moneys received after November 23, 1924, in accordance with the terms of said instruments dated March 23, 1920."

It appears from the foregoing that the receivers of the Union Bank had in their possession $2,020.88, which the decree ordered be paid to the Finance company. Are the receivers, individually and as trustee, were ordered to pay to the Finance company $4,070.42, the amount of these two items improperly collected from the sale of the lots made by Stone & Co., and which differ to such commissions now belongs to the finance company.

The decree from which the appeal in prosecuted was entered by the Circuit court of Cook county July 17, 1926. That decree modified a decree entered in the same May 3, 1926, in which last

mentioned decree the claim to the commissions of $6,026.99 was held to belong to G. William Christoph and Henry F. Lawrence, but the court found that the Finance company had no notice of the proceedings that led up to the decree of May 3, 1933, and that it was therefore void as to the Finance company.

The Oak Park Bank contends that the master's report and the decree of July 13, 1935, which confirmed the report, are erroneous in holding that there was an equitable assignment of the commissions earned by H. O. Stone & Co. to the Finance company. The basis of the Finance company's claim that it is the equitable owner of the commissions, is based on two written documents dated March 21, 1930. Both of these documents are in the form of letters signed by Christoph and Niles, one addressed to H. O. Stone Subdividers, Inc., and the other to The Guardian National Bank. In the document to Stone & Co., Christoph and Niles grant to Stone & Co. "the agency for the Woodcrest Subdivision properties for a period of one year***.

"In consideration of any sales made by H. O. Stone Subdividers, Inc., *** you are to receive forty (40%) per cent commission on the sales price of any lot or lots sold, such commission to be paid as follows:

"One-half of the initial or down payment and one-half of all collections thereafter until the sum equals forty (40%) per cent of the purchase price.

"It is further understood and agreed that the Guardian National Bank of Chicago, or any other trustee that might be appointed shall receive the entire down payment and monthly collections if any. All contracts are to be signed by The Guardian National Bank of Chicago, which contracts contain all conditions and provisions under which you are to represent the sale of the property, a copy of which contract is hereto attached."

The document to The Guardian National Bank is as follows:

mentioned person had right to his compensation as $3,000.00 [illegible] to belong to C. William Christiansen and Harry E. [illegible], but the court found that [illegible] Company was in default in the proceedings that led up to the decree of May 6, 1930, and that it was therefore entitled to the [illegible] company.

The New York Bank contends that the court's [illegible] the decree of July 11, 1930, which confirmed the report, [illegible] erroneous in holding that there was an equitable assignment of the commissions earned by H. D. Stone & Co. to the [illegible] company. The basis of the [illegible] company's claim that it is the equitable owner of the commissions, is based on two written documents dated [illegible], 1930. Both of these documents are in the form of letters signed by Christiansen and [illegible], the [illegible] of [illegible] Enterprises, Inc., and the other to the [illegible] National Bank. In the document to Stone & Co., Christiansen and [illegible] [illegible] "The agency for the [illegible] [illegible] and [illegible].

"In consideration of [illegible] [illegible] [illegible] etc., Inc., we [illegible] [illegible] [illegible] or the [illegible] [illegible], [illegible] be paid as follows:

"One-half [illegible] [illegible] [illegible] all satisfaction [illegible] [illegible] to the [illegible] the purchase price.

"It is [illegible] [illegible] National Bank of [illegible] [illegible] pointed shall receive [illegible] [illegible] transactions. All [illegible] [illegible] National Bank of [illegible], [illegible] and provisions [illegible] [illegible] property, a copy of which [illegible].

The document to the National Bank [illegible].

"You are hereby authorized to sign contracts of sale for any lot or lots in the property held by your bank under Trust No.19.

"You are further authorized to pay to H. O. Stone & Co. 40% commission on the sale price in the manner following:-

"One-half of the initial or down payment and one-half of all collections thereafter until the sum equals forty (40%) per cent of the purchase price.

"This amount is to be paid to H. O. Stone & Co. not later than the 5th day of each month."

The evidence tends to show that after the execution of these two documents, the H. O. Stone company proceeded to sell the lots; that payments were made to The Guardian Bank and commissions were paid by the bank and other disbursements made by it about which there is no objection; that The Guardian Bank was later succeeded by the Union Trust Bank of Chicago, which apparently proceeded in like manner. Afterward H. O. Stone & Co. were in bankruptcy; later the Union Bank of Chicago was in financial difficulty, and the Auditor of Public Accounts filed the suit in the instant case under the statute to liquidate the bank. The receiver was appointed and later real estate contracts were turned over to the Oak Park Bank.

No complaint is made of the decree in the instant matter by the receiver of the Union Bank of Chicago, nor by Christoph or Lawrence, and the only matter in controversy is whether the Finance company, who purchased Stone & Co.'s claim to the commissions, is entitled to them. We think it obvious that, as between the Finance company and the Oak Park bank, the Finance company is entitled to the $6,026.09 in the hands of the receiver of the Union Bank, and this result is not in any way affected by the fact that afterward Christoph and Lawrence attempted to assign any interest they might have in the sum to the Oak Park Bank. They could not assign the commissions earned by Stone & Co. because they had no interest in

them and the attempted assignment was ineffectual so far as it purported to affect Stone & Co. or its assignee, the Finance company.

We are also of opinion that the Oak Park Bank, having collected commissions under the real estate contracts, should be required to pay one-half of the commissions to the Finance Company in accordance with the provisions of the two documents of March 21, 1930, above quoted. We think these two documents were sufficient to warrant the chancellor in holding that there was an equitable assignment of one-half of the funds collected on account of the purchase price of the lots to H. O. Stone & Co. and its assignee, the Finance Co. Lewis v. Braun, 356 Ill. 467; Warren v. First National Bank, 149 Ill. 9.

The Oak Park Bank further contends that the court was without jurisdiction (1) to modify the decree of May 3, 1933, and (2) to determine the liability, if any, of the Oak Park Bank to the Finance Company, and to enter a decree against the Bank individually. We think none of these contentions can be sustained.

(1) The decree of May 3, 1933, which awarded the commissions, $6,026.99, to Christoph and Lawrence, was entered without notice to the Finance company although Christoph and Lawrence knew that H. O. Stone & Co.'s right to the commissions had been sold to the Finance company. Obviously the decree could not affect the Finance company's rights, and since the money involved was still in the possession of the receiver of the Union Bank and of the Oak Park Bank, the court was warranted, after hearing the evidence, in finding and decreeing that the commissions did not belong to Christoph and Lawrence but to the Finance company.

(2) We think, too, the court had jurisdiction to determine the liability of the Oak Park Bank to the Finance company since both the Finance company and the Oak Park Bank were claiming the $6,026.99 in the hands of the receiver of the bank. Obviously,

them and the attempted [illegible] far as it purported to affect those [illegible] or [illegible] the [illegible] remedy.

We are also of opinion that [illegible], unpaid collected commissions under the [illegible], should be required to pay [illegible] in accordance with the [illegible] 21, 1936, above quoted. [illegible] sufficient to warrant the [illegible] equitable [illegible] of the purchase price of the lots [illegible] assignee, the Finance Co. [illegible] First National Bank, 140 [illegible].

The [illegible] without jurisdiction (1) [illegible], and (2) to determine the liability [illegible] the Finance Company, [illegible] individually. We think none of [illegible].

(1) [illegible] sion, [illegible] notice [illegible] made [illegible] the Finance Company. [illegible] Finance Company's [illegible] the [illegible] of the [illegible]. Thus, the court [illegible] and [illegible] and [illegible] the [illegible] Company.

(2) [illegible] the liability of [illegible] both the Finance Company [illegible] $6,077.69 [illegible] the basis of [illegible].

before the receivership of the Union Bank could be closed up, the question of the ownership of this fund must be determined by the court. And we are further of opinion that since the record discloses that the Oak Park Bank collected money from the purchasers of lots after it had succeeded the Union Bank, it should be required to account for the money so collected, one-half of which belonged to the Finance company as assignee of H. O. Stone & Co.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

before the receivership of the Union Bank could be closed up, the question of the ownership of this fund must be determined by the court. And we are further of opinion that since the recent disclosure that the Park Bank collected money from the purchasers of lots after it had accepted the Union Bank, it should be required to account for the money so collected, one-half of which belonged to the Finance company as assignee of L. . Deane & Co.

The decree of the circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Mordecai, C. J., and Raymond, J., concur.

38576

BELLE COHEN,
Appellee,

vs.

GAYTIME FROCKS, INC., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 649[3]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment by confession to be entered by the Municipal court of Chicago on a written lease for rent for the month of January for $350 and $60 attorney's fees, or a total of $410. Afterward defendant filed a motion and affidavit and the judgment was opened up and leave given to defend. The case was later tried before the court without a jury, the court found the issues for plaintiff, the judgment theretofore entered by confession was confirmed, and defendant appeals.

The record discloses that September 7th the parties entered into a written lease whereby plaintiff demised to defendant a store known as 4734 South Ashland avenue, to be occupied by defendant for "ladies' wearing apparel" from the first of October, 1934, until April 30, 1936. Apparently defendant had occupied the same premises under a prior lease. The rent was $350 a month, payable on the first of each month, in advance. The evidence tends to show that from time to time defendant complained that the store was not properly heated and that it lost customers on this account. On January 7th it vacated the premises, paying plaintiff the rent up to and including the date of its vacation. Plaintiff refused to receive the check sent her by defendant for the seven days it occupied the premises in January and afterward caused judgment for confession to be entered for that month, as stated.

There is some evidence to the effect that the temperature in the store was much lower than it should have been, and that

38576

MILLER COURT,
Appellee,

vs.

GAYTIES MFG. Co., a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT.
HON. [illegible] JUDGE.

SPECIAL CAUSE.

MR. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff caused judgment by default to be entered by the Municipal Court of Chicago on a written lease for the month of January for $300 and $25 attorney's fees, or a total of $325. Afterward defendant filed a motion and affidavit and the judgment was opened up and leave given to defend. The case was later tried before the court without a jury, the court found for plaintiff, the judgment [illegible] by contrary to the evidence, and [illegible].

The record indicates that [illegible] entered into a written lease covering [illegible] to occupy a store known as 1734 South Halsted Street, [illegible] by defendant for "ladies' wearing apparel" [illegible], until April 30, 1920. [illegible] under a prior lease. The [illegible] of the first of each month, [illegible] from time to time [illegible] properly [illegible] January [illegible] to end [illegible] receive the [illegible] counsel [illegible] for cancellation [illegible] month, [illegible].

There is some evidence [illegible] in the store was over [illegible]

because of this defendant was unable to conduct its business properly and apparently lost some customers.

Defendant's position is that plaintiff was required to maintain a heating plant and furnish heat for the premises; that defendant was "obligated to pay one-third of the cost of heating the entire building premises of which the store demised to the defendant was a part, and one-third of the janitor services;" and that plaintiff failed to properly heat the store, as a result of which defendant was obliged to vacate. Plaintiff's agent called by defendant, testified in substance that he supervised the maintenance of the boiler which supplied heat to the premises, which consisted of three stores, one of which was occupied by defendant; that defendant had made several complaints and plaintiff had sent over a plumber and steam fitter to check the heating plant. There is further evidence to the effect that the occupant of each of the three stores was required to pay one-third of the cost of the fuel and the services of the janitor in heating the premises;

Counsel for plaintiff points out no provision in the lease which requires the plaintiff to heat the premises, and the evidence shows that plaintiff, during the time the complaints were being made, took the position that she was not required to heat the premises but that the duty devolved upon the tenants, including defendant. There being no requirement in the lease requiring plaintiff to properly heat the building, and no evidence that plaintiff at any time agreed to do so, defendant was not warranted in vacating the premises and claiming it had been constructively evicted by plaintiff.

There is further evidence to the effect that shortly after defendant vacated the premises plaintiff secured another tenant who occupied the store a few days after it was vacated by defendant.

because of this defendant was unable to submit his business properly and apparently lost some customers.

Defendant's position is that plaintiff was required to maintain a heating plant and [illegible] the premises; that defendant was "obligated to pay one-third of the cost of heating the entire building premises of which the store desired to the defendant was a part, and one-third of the janitor services;" and that plaintiff failed to [illegible] the premises, as a result of which defendant was obliged to vacate. [illegible] by defendant, testified [illegible] maintenance of the boiler which [illegible] the premises, which consisted of three stores, and of [illegible] by defendant; that defendant had made [illegible] plaintiff had sent over a plumber [illegible] the heating plant. There is [illegible] equipment of some [illegible] the cost of the fuel and the services of a janitor in heating the premises;

Counsel for plaintiff points out no [illegible] which relates the liability to heat the premises, [illegible] shows that plaintiff, [illegible] made, took the position that she was [illegible] premises but [illegible] defendant. [illegible] plaintiff [illegible] plaintiff [illegible] in vacating the premises [illegible] evicted by plaintiff.

There is [illegible] defendant vacated the premises [illegible] occupied the store a few days after it was vacated by defendant.

And defendant contends that if plaintiff had received any rent for the month of January or any part thereof, the amount should be deducted from the $350 and that the court refused to permit counsel for defendant to elicit such facts from a witness. The law is, as contended for by defendant's counsel, that the measure of damages upon abandonment by a tenant is the rent agreed to be paid, less whatever the landlord could have made out of the premises by the use of reasonable diligence after they were vacated. Hinde v. Radansky, 161 Ill. App. 216. But the difficulty with this proposition is that there was no evidence that plaintiff received any rent for the month of January. On the contrary, the court stated to counsel for defendant that if he wanted to ask the witness then on the stand how much rent plaintiff had been paid for the premises for the month of January he might do so. But no such question was asked. The questions were with reference to the nature of the lease that had been entered into by plaintiff with the new tenant.

Defendant's counsel make no complaint on account of the amount allowed for attorney's fees in confessing the judgment. Since plaintiff was not obliged to heat the premises, but on the contrary that duty devolved upon the tenants, including defendant, and since there was no evidence that plaintiff had received any rent from the new tenant for the month of January, the judgment of the Municipal court must be affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

And defendant contends that if plaintiff had received any rent for the month of January or any part thereof, the amount should be deducted from the jury and that the court refused to permit counsel for defendant to elicit such facts from a witness. The law is, as contended for by defendant's counsel, that the measure of damages upon abandonment by a tenant is the rent agreed to be paid, less whatever the landlord could have made out of the premises by the use of reasonable diligence after they were vacated. Hodge v. Sadgenby, 1ol Ill. App. 7ls. But the difficulty with this proposition is that there was no evidence that plaintiff received any rent for the month of January. On the contrary, the court stated to counsel for defendant that it no wanted to ask the witness then on the stand how much rent plaintiff had been paid for the premises for the month of January he claimed to do so. [illegible] such evidence was asked. The questions were with reference to the failure of the lease that had been entered into by plaintiff in the new tenant.

Defendant's counsel made no [illegible] on account of the amount allowed for attorney's fees in [illegible] the judgment. Since plaintiff was not obliged to rent the premises, but on the contrary that duty levied upon the tenants, including defendant, and since there was no evidence that plaintiff had received any rent from the new tenant for the month of January, the judgment of the municipal court must be affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Gemmill, J., concur.

38605

THOMAS DURKIN,
Appellant,

vs.

HARRY F. COLLINS,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

284 I.A. 649

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover six months rent from November 1, 1934, to April 30, 1935, at $40 a month, claimed to be due him from defendant under the terms of a written lease. He also claimed $43.50 attorney's fees which he claimed to have incurred in the suit. The case was tried before the court without a jury, there was a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that plaintiff owned an eight-flat building in Chicago. He and his family lived in one of the apartments; defendant and his family rented one of the apartments for a term beginning about July, 1933; apparently at the termination of that lease the parties entered into a written lease for one of the apartments covering a period from the first day of May, 1934, to the thirtieth of April, 1935, at $40 a month, payable in advance. The lease required plaintiff to furnish heat and hot water. Defendant occupied the apartment until November 9, 1934, when he moved out, claiming that he was compelled to do so because of plaintiff's failure to furnish heat and water, and that the lessor and his family so interfered with his peaceful enjoyment of the premises that he was compelled to vacate.

The evidence shows defendant was a school teacher employed by the City of Chicago; that he was not paid promptly by the City for his services and was often late in the payment of his rent. He paid the rent until the first of November, 1934, and about the time he vacated, November 9th, sent plaintiff a certified check for

NICHOLAS DUNLAIN,
Appellant,

vs.

HARRY A. WILLIAMS,
Appellee.

Appeal from Superior Court
of Lake.

[illegible]

[illegible] month rent from [illegible] month, [illegible] written [illegible] clear [illegible] the court [illegible] defendant [illegible]

[illegible]

$11.97, being the amount he claimed was the rent for the nine days of November during which time he occupied the apartment. Plaintiff refused to accept this check and it was returned to defendant. The evidence also shows that after defendant vacated the premises, plaintiff endeavored to secure a new tenant but was unable to do so. Shortly after the beginning of the trial the court stated that since there was no jury he would allow some latitude to both sides in the admission of evidence.

The evidence is to the effect that for some time prior to November, 1934, defendant's wife was receiving treatment at the Municipal Tuberculosis Sanitarium. She testified that water and heat were cut off from her apartment in October, and that "When I asked for heat they told me to get out;" that shortly thereafter she made complaint to the Health Department. She further testified she had no water to take a bath and had to go to her mother's home across the street to do so; that at one time the temperature was 62 degrees in her apartment; that she and her husband kept a diary as to the temperature, etc., of the apartment; she produced the memoranda and it is in the record; that the landlord's wife annoyed her a number of times, pounded on the door and demanded payment of rent, and said, "My husband is going to kill Mr. Collins;" that there was no heat or water on November 6th; that on October 27th at 8:30 p. m. the temperature was 60 degrees in the bathroom; that on October 30th there was no heat in the radiators; that she complained to the janitor and he threatened to strike her with a wrench; that on October 31st the temperature was 60 degrees at 7 a. m., 61 at 8 a. m. and 64 at 8:30 a. m.; that she then called up the Health Department. Defendant's wife further testified, "The janitor disconnected the heat leading to my apartment and the radiators were cold." She further testified as to other misunderstandings with the landlord's wife.

$111.97, being the amount he claimed was the rent for the nine days of November during which time he occupied the apartment. Plaintiff refused to accept this check and it was returned to defendant. The evidence also shows that after defendant vacated the premises, plaintiff endeavored to secure a new tenant but was unable to do so. Shortly after the beginning of the trial the court stated that since there was no jury he would allow some latitude to both sides in the admission of evidence.

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Catherine McAllister, who apparently was a friend of the defendant, and who took defendant's wife to the Tuberculosis Sanitarium for treatments, testified she was at the apartment in September and October, 1934; that there was a lack of heat on those occasions; that on one of those visits Mrs. Collins complained of the lack of heat and the landlord replied that he was not going to give her heat "like I did last year;" that it was 60 degrees that afternoon; that a few days later when she again called the temperature was 62, another time it was 63, and that it was never as high as 70 degrees.

The memoranda above mentioned, prepared by defendant and his wife, contains other matters than the lack of heat in the apartment. When defendant's wife was being cross-examined about some of these memoranda the court said the cross-examination should be limited to the memoranda that pertained to the case.

Defendant testified he was a teacher at the Tilden High school; the evidence shows that the City was not paying him promptly and that he was late in the payment of his rent; he testified that in November plaintiff and his wife tried to pick a fight with him; that on November 6th, when he was engaged in some household work plaintiff demanded payment of the rent, and defendant said, "If you don't like it, why don't you give me notice to move?"; that plaintiff did not reply but continued scolding; that on October 23rd the cold water was turned off; that on October 29th they had no heat.

Mary Cody, defendant's mother-in-law, who lived across the street, testified that on October 26th, when defendant and his wife were away, plaintiff came to her back door and said, "I want my rent;" that she replied the Collins were not at home and that when the landlord gave them water they would pay the rent, and the landlord replied, "I am going to fix Mr. Collins;" that on the next day

Catherine McAllister, who apparently was a friend of the defendant, and who took defendant's wife to the incorporeal sanitarium for treatments, testified she was at the apartment in September and October, 1931; that there was a lack of heat on those occasions; that on one of those visits she, Collins complained of the lack of heat and the landlord replied that he was not going to give her heat "like I did last year;" that it was 20 degrees that afternoon; that a few days later when she again called the temperature was 62, another time it was 64, and that it was never as high as 70 degrees.

The memoranda above mentioned, prepared by defendant and his wife, contains other matters than the lack of heat in the apartment. When defendant's wife was being cross-examined about some of these memoranda the court said the cross-examination should be limited to the memoranda that pertained to the case.

Defendant testified he was a teacher in the Tilden High school; the evidence showed that the city was not paying his property and that he was late in his payment of his rent; he testified that in November plaintiff had asked him to give a lien with him; that on November 6th, some months after he in some fashion had plaintiff demanded payment of the rent, and testified that, "If you don't like it, why don't you give me notice to move?"; that plaintiff did not reply but continued complaining; that on October 23rd the cold water was turned off; that on October 6th they had no heat.

Mary Cody, defendant's mother-in-law, testified across the street, testified that on October 6th, that defendant and his wife were away, plaintiff came to her door and said, "I want my rent;" that she replied the coilers were not at home and that when the landlord gave them water they would pay the rent, and the landlord replied, "I am going to fix my coilers;" that on the next day

plaintiff's wife called and demanded the rent and was told defendant was not there at the time; "When she tells me that he is in a fit of madness and is going to kill him, I don't want my son-in-law to go in there and have any trouble. I put a note on the garage door and he came to my house."

In rebuttal plaintiff called an inspector of the Health Department of the City and produced records made by another inspector concerning the apartment in question; the records showed the inspector called at the apartment on November 2nd but could not gain entrance to Collins' apartment; that a tenant in one of the other apartments stated they were having sufficient heat; that the inspector called again November 7th and the temperature in the Collins' apartment at noon was 76 degrees; that a complaint had been made to the Health Department, which was the reason for the inspector going to the Collins apartment.

Carrie M. Jones, called by plaintiff, testified that "During 1934" she visited the apartment building two or three times a week; visited all the tenants except the Collins and that the halls were always heated.

The record then discloses, "The court sustained objections to the condition of heat in other apartments."

The janitor of the building testified he was janitor of the building in 1934, but was not so employed at the time of the trial; that he knew the Collins; that during the months of September, October and November, 1934, there was nothing wrong with the heating plant; that there was a single heating plant for the building; that there was no way to shut off the heat of one apartment without shutting off the heat as to all of them; that during the fall defendant Collins complained about the heat and that he told him to see the landlord, - "We take no orders from the tenants;" that at one time when he was in the apartment between 9 and 11 o'clock in

plaintiff's wife called and demanded the rent of the tall tenant, but was not there at the time; "What the hell is it to you if it of madness and is going to kill him. I don't want my son-in-law to go in there and keep my trouble. I put a note on the outside door and he came to my house."

In rebuttal plaintiff called as witness - the Health Department of the city and produced records made by another inspector concerning the apartment in question; the records showed the inspector called at the apartment on November 2nd but could not gain entrance to Collins' apartment; that - found in one of the other apartments stated they were [illegible] sick; that the inspector called again November 7th and [illegible] to see Collins' apartment at noon was 75 degrees; that complaint had been made to the Health Department, which was the reason for the inspector going to the Collins apartment.

Gertie M. Jones, recalled by counsel, testified that "during 1924" she visited the apartment twice; [illegible] three times a week; visited all the tenants [illegible] that the radiators were always heated.

In rebuttal the defendant, "the court overruled objections to the competition of heat in other apartments."

The janitor of the building testified [illegible] of the building in 1924, she was not employed at the time of the trial; that he knew the Collins; that during the November, December, October and November, 1924, there was no heat [illegible] the heating plant; that there was a single heating plant in the building; that there was no way to shut off the heat of [illegible] apartment without shutting off the heat in all of them; that during the [illegible] Tenant Collins complained about the heat [illegible] to see the landlord, - "he says to order from the janitor;" that at one time when he was in the apartment between [illegible] in

the morning, it was about 80 degrees but he was only in the kitchen at that time; that he never turned off the heat from the apartment; that he did not know defendant's wife was suffering from tuberculosis; that he did not know she was ill but only that she was nervous; that he did not turn off the water; that "During the months of September, October and November, 1934, I had no complaint from any other tenants in the building."

Plaintiff testified in his own behalf in rebuttal that he lived in the apartment below defendant; that he never discussed with defendant the question of defendant's moving before the expiration of the lease; that defendant moved out without saying anything and that he never had a quarrel with defendant; that defendant got the same heat as everyone in the building; that if the heat was shut off it would be shut off from the whole building; that he was friendly with the defendant "until his father-in-law moved across the street and did everything in his power to move out."

The court refused to permit two witnesses called by plaintiff (who were tenants of other apartments in the building) to testify as to the condition of heat in their respective apartments, and also refused to permit two other witnesses to testify on this matter.

Plaintiff's wife testified and denied she had told defendant her husband was going to kill Mr. Collins; that she never tried to pick a quarrel with the Collins; they were on friendly terms; that in the latter part of October she heard water flowing very hard and went downstairs and found Mr. Collins there; "There were two faucets of boiling water flowing down the sewer, and no clothes in the tubs, and both stoppers removed;" that when she spoke to Collins about it he swore at her; that when the inspector from the Health Department called the heat in witness's apartment was 79; the water was not shut off.

the morning, it was about 60 degrees but he was only in the kitchen at that time; that he never turned off the heat from the apartment; that he did not know defendant's wife was suffering from tuberculosis; that he did not know she was ill or that that she was nervous; that he did not turn off the water; that "during the months of September, October and November, 1935, I did not complain from my other tenants in the building."

Plaintiff testified in his own behalf in rebuttal that he lived in the apartment below defendant; that he never discussed with defendant the question of defendant's moving before the expiration of the lease; that defendant moved out without saying anything and that he never had a quarrel with defendant; that defendant got the same heat as everyone in the building; that in the heat was shut off it would be shut off from the whole building; that he was friendly with the defendant "until his father-in-law moved across the street and did everything in his power to move out."

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Plaintiff's wife testified she moved out and did defendant her husband was going to kill her. Continue; that she never went to pick a quarrel with the defendant; that were on friendly terms; that in the latter part of October or November the heating was cut and went downstairs and found Mr. Goldin there; "there were two faucets of boiling water flowing from the sewer, and in kettles in the tube, and both stoppers removed;" that she and Mrs. Goldin talked about it he swore at her; that after the intervention from the Health Department called the heat in defendant's apartment was 72; the water was not shut off.

Plaintiff contends (1) that the burden was on defendant "of proving intent to evict under a defense of constructive eviction"; (2) that "plaintiff was only required to furnish heat during the months specified in the lease, or as required under section 2119 of the Municipal Code"; (3) that the documents (memoranda prepared by defendant and his wife, as above stated) were self-serving and inadmissible in evidence; (4) that the "Documents and letters, the contents of which are self-serving, are inadmissible;" (5) that the landlord is entitled to rent for the entire period the tenant occupied the premises; (6) that the defendant, having set up an affirmative defense, had the burden of proof. We think these contentions must be sustained with the qualification that it is not necessary, under the law, for the tenant, who takes the position that he was constructively evicted from the premises, to show that the landlord had an actual intent of forcing him to move from the premises.

In Gibbons v. Hoeffeld, 299 Ill. 455, which is cited by both sides, where the tenant interposed a defense that he had been constructively evicted, the court said (p. 464): "We do not understand the law to be that an omission of duty by the landlord which has the effect of depriving the tenant of the enjoyment of the demised premises must be shown to have been with the intent that such would be the effect of the omission. Whether the landlord intended that result could not, it seems, in reason, be a determining factor if he wilfully refused to fulfill his promise or so negligently performed it that what he did was of no benefit in protecting plaintiff in error in the enjoyment of the demised premises," and that where the evidence is conflicting on the question of constructive eviction, it is usually one of fact for a jury, or the court where the case is tried without a jury. So, in the instant case we think the questions whether the landlord furnished sufficient heat and water and whether his conduct was such as to deprive the tenant of the

Plaintiff contends (1) that the court was in error in not "of proving intent to evict under [illegible] of constructive eviction"; (2) that "plaintiff was not, [illegible] in failing to bring the months specified in the [illegible] requiring under section 712 of the municipal code"; (3) that the concerts (complained of by defendant and his wife, [illegible]) were self-serving and inadmissible in evidence; (4) [illegible] "occasion [illegible] later, the contents of which [illegible] self-serving, [illegible]"; (5) that the landlord is entitled to rent [illegible] the premises; (6) [illegible] vitiated by an affirmative defense, and the [illegible] constructive must be sustained [illegible] under the law, for the [illegible] constructively evicted [illegible] the landlord had an actual intent of forcing [illegible] to move from the premises.

In Gilmore v. Goetzinger, [illegible] 1, which is cited by both sides, where the tenant [illegible] and had been constructively evicted, the court said (p. [illegible]): "We do not understand the law to be that an [illegible] right has the effect of deciding the [illegible] of the [illegible] premises must be shown [illegible] and could be the effect of the [illegible]. [illegible] intention that result could not, it seems, in reason, be a [illegible] if he willfully refuses to fulfill the promise or [illegible] it that what he did was or is [illegible] error in the [illegible] premises," and that where the evidence is conflicting as to the question of constructive eviction, it is usually [illegible] jury, or [illegible] tried without a jury. So, in the [illegible] the questions answer the landlord [illegible] and weather his conduct was such as to justify the tenant in the

enjoyment of the apartment, are questions of fact to be determined by the trial judge. He saw and heard the witnesses testify and was in a much better position to determine the truth of the matter in controversy than we are with only the printed page before us. And under the law we are not warranted in disturbing the finding of the trial court unless we are of opinion the finding is against the manifest weight of the evidence. Upon a consideration of all the evidence we are of opinion we would not be warranted in disturbing the finding of the trial Judge on this question.

Complaint is made to the admission in evidence of the memoranda prepared by defendant and his wife. Counsel for plaintiff argues that the memoranda was self-serving and inadmissible, but the difficulty with this contention is that the memoranda was offered and received in evidence without any objection. In these circumstances the question is not saved for review. We might say, however, that we think it appears from the record that the court did not consider the matters contained in the written memoranda which were not germane to the question before the court; so we can not say, although the evidence was not objected to, that plaintiff was prejudicially affected.

Plaintiff contends the court erred in failing to enter judgment for $11.97, being the amount of rent for the nine days of November during which time defendant occupied the apartment. The difficulty with this contention is that defendant tendered this amount but plaintiff refused to accept it and is not now in a position to complain.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

enjoyment of the [illegible], the question of fact [illegible] determined by the trial judge. In [illegible] the evidence [illegible] and was in a much better position to determine the truth of the matter in controversy than we are [illegible] only the printed page before us. And under the law we are not warranted in disturbing the finding of the trial court unless we are of opinion the finding is against the manifest weight of the evidence. Upon a consideration of all the evidence we are of opinion [illegible] be warranted in disturbing the finding of the trial court [illegible] this question.

Complaint is made in the abstract in evidence of the memoranda prepared by defendant [illegible]. Counsel for plaintiff argues that the memoranda [illegible] are inadmissible, but the difficulty with this [illegible] is that [illegible] was offered and received in evidence without any objection. In these circumstances the question is not [illegible] review. It is, we say, however, that [illegible] the record of the court did not consider the [illegible] the written memoranda which were not [illegible] the [illegible]; so we can not say, although the evidence [illegible] over to, that plaintiff was prejudiced [illegible].

Plaintiff's [illegible] made [illegible] to enter judgment for $[illegible], [illegible] on the [illegible] nine days of November during [illegible] time [illegible] accounting [illegible]. The difficulty with [illegible] conclusion is that [illegible] amount [illegible] in a position to [illegible].

The [illegible] of the [illegible] of [illegible] is affirmed.

Judgment affirmed.

McSurely, P. J., and Burnett, J., concur.

38614

THE WINKLER-KOCH ENGINEERING CO.,
a Corporation,
Appellant,

vs.

THE ROSS HEATER & MANUFACTURING CO.,
INC., a Corporation,
Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

284 I.A. 650

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover the purchase price and damages on account of the alleged failure of performance of two new heat exchangers bought by it from defendant; the ad damnum was laid at $30,000. The case was tried before the court without a jury, which found for the defendant, and from the judgment that plaintiff take nothing it appeals.

The heat exchangers were to be used in connection with an oil cracking plant which plaintiff was erecting at Lemont, Illinois; they are of metal construction, cylindrical in shape, apparently about twenty feet long and fifteen feet in circumference and stand vertically when in position; oil is passed into the exchanger at the bottom through channels and it then goes through small tubes running nearly the full length of the exchanger; it is subjected to heated vapor so that the oil leaves the exchanger at a high temperature which cracks or breaks it up, freeing various products which are distilled off.

The substance of plaintiff's claim is that the exchangers furnished by defendant did not function properly, thus failing to meet defendant's guarantee of performance. Defendant says that the old agreement which contained its guarantee was superseded by a new agreement and that this was breached by plaintiff alone.

Under date of March 5, 1930, defendant addressed a letter to plaintiff soliciting an order for heat exchangers to be used

38614

THE KIMBLE-ROOK CONSTRUCTING CO.,
a Corporation,
Appellant,

vs.

THE NOSE MAYER & MANUFACTURING CO.,
INC., a Corporation,
Appellee.

MR. [illegible] DELIVERED THE OPINION
[illegible]

[illegible] price and [illegible] of [illegible] of [illegible] of the new [illegible] by [illegible] damage was [illegible] of [illegible]. The case was [illegible] without a jury, [illegible] and for the [illegible] ment that plaintiff [illegible] in [illegible].

The [illegible] oil cracking [illegible] plaintiff was [illegible] dels; they are [illegible] partly about [illegible] and steel vertical [illegible] changer at the [illegible] small tubes [illegible] subject to [illegible] a high temperature [illegible] products [illegible].

The [illegible] fracture by [illegible] metal deformation [illegible] the old [illegible] by a new [illegible] [illegible].

[illegible] to plaintiff [illegible]

in the plant at Lemont, Illinois; defendant proposed to furnish two vertical high pressure inter-condensers (this seems to be another name for heat exchangers) similar to those furnished to certain other oil companies for use in their high pressure cracking coils. The letter stated that these exchangers were designed to make them readily accessible for cleaning. Apparently plaintiff had submitted specified conditions, and defendant's letter approved of these. A rough sketch of the units was enclosed with a statement that detailed drawings would be submitted for approval if defendant received the order for the equipment. The letter contained the following: "All units will be guaranteed to meet their specified performance and warranted free of all defects in workmanship, material and design for a period of one year."

In response to this plaintiff on March 6th ordered from defendant two heat exchangers. The order stated that they should be designed "for high temperature operation and are to be of exceedingly rugged construction because of severe conditions of operation." The order repeated the provision in defendant's letter with reference to the guarantee that the units would meet "their specified performance" and be free of all defects in workmanship, material and design for one year.

The exchangers were installed the latter part of June and put into operation in the early part of July, 1930, and plaintiff paid defendant $11,000, the purchase price of the exchangers. It is conceded that the exchangers did not function properly; the liquid oil which entered through the channel at the bottom did not pass upward through the small tubes to be subjected to the vapor heat, but passed straight through the channel section at the bottom to the opposite side and through the outlet; gaskets blew out and there was leaking at the stay bolts; the nuts were so close to the rivets that it was impossible to engage them with a

in the plant at Lemont, Illinois; defendant proposed to furnish two vertical high pressure inter-condensers (this seems to be another name for heat exchangers) similar to those proposed to certain other oil companies for use in their high pressure cracking units. The letter stated that these exchangers were designed to make them readily accessible for cleaning. Apparently plaintiff had submitted specified conditions, and defendant's letter answered of these. A rough sketch of the units was enclosed with a statement that detailed drawings would be submitted for approval if defendant received the order for the equipment. The letter concluded the following: "All units will be guaranteed to meet their specified performance and warranted free of all defects in workmanship, material and design for a period of one year."

In response to this [illegible] defendant two heat exchangers. The order stated that they should be designed "for high temperature operation and are to be of extremely rugged construction to withstand severe conditions of operation." The order referred [illegible] defendant's letter with reference to the guarantee [illegible] specified performance" [illegible] workmanship, material and design for one year.

The exchangers were [illegible] and put into operation in the [illegible] paid defendant $[illegible], the purchase price of [illegible]. It is conceded that the exchangers did not function properly; the liquid oil water mixture [illegible] passed through the exchanger [illegible] heat, but passed [illegible] bottom to the opposite side and through the [illegible] cut and there was leaking at the [illegible]; [illegible] close to the rivets that it was impossible to [illegible]

wrench, so that to open the exchanger for cleaning it became necessary to split the nuts with a cold-chisel, and others were burned off; attempts were made by representatives of both parties to remedy the defects.

In August plaintiff submitted to defendant a bill amounting to $8778.91, which it claimed as its expenses in attempting to make the exchangers function. Representatives of the parties met to effect a settlement of the claims; letters and conferences followed; finally a written memorandum dated September 18, 1930, was drawn in and by which it was agreed that the defendant pay plaintiff $5818.76 as the amount expended by plaintiff in making necessary repairs and changes in the heat exchangers; defendant also agreed to furnish new channels to be welded direct to the stationary tube sheet; also to burn out slotted bolt holes on both shell flanges, the stationary tube sheet and the shell cover flange so that bolts may be moved a sufficient distance from rivet heads to permit free access with a standard wrench; defendant agreed to furnish new bolts and nuts wherever those in use had been damaged by repairs, also to submit drawings showing the details of such changes for the approval of plaintiff, with the provision, however, that plaintiff's "approval of these drawings does not relieve the Ross Heater & Mfg. Co. of responsibility from correctness of design or performance of these units." It was also agreed that tests should be made by defendant of a special arrangement of slotted bolts with wedges to determine whether such an arrangement was suitable for this service, and if the tests indicated a suitability defendant agreed to furnish them between the channel and channel cover plate. It was agreed that the defendant should be liable only for material and labor applied in making these changes and should not be charged for any loss of product or contingent damages which might accrue due to making these changes. Defendant

wrench, so that to open the cover for cleaning it became necessary to split the nuts with a cold-chisel, and others were burned off; attempts were made by representatives of both parties to remedy the defects.

In August plaintiff submitted to defendant a bill amounting to $8776.01, which it claimed as the expense in attempting to make the exchangers tenable. Representatives of the parties met to effect a settlement of the claim; letters and conferences followed; finally a written memorandum dated December 14, 1919, was drawn up and by which it was agreed that the defendant pay plaintiff $5816.76 as the amount expended by plaintiff in making necessary repairs and changes in the heat exchangers; defendant also agreed to furnish new gaskets to be nailed direct to the stationary tube sheet; also to furnish out slotted bolts to be on both shell flanges, the stationary tube sheet and the shell cover flange so that there may be never a sufficient distance from rivet heads to permit free access [illegible] shaded wrench; defendant agreed to furnish new bolts and nuts wherever those in use had been damaged by repairs, also to furnish drawings and the details of such changes for the approval [illegible] it, after the division, however, that plaintiff "[illegible] of these drawings does not relieve the defendant [illegible] of responsibility from correctness of design or performance [illegible]." It was also agreed that tests should be made by defendant of a special arrangement of slotted bolts which [illegible] to determine whether such a arrangement was suitable for this service, and if the tests indicated a satisfactory defendant agreed to furnish new bolts between the shell and channel cover flange. It was agreed that the defendant should be liable only for material and labor up [illegible] in making these changes and should not be charged for any loss of profits or consequent damages which might accrue due to making these changes. Defendant

agreed to make these changes "with all possible speed," and that the shut-down of the exchangers should not exceed two weeks. This memorandum was executed by both parties, defendant signing September 30, 1930, and on that date sent its check to plaintiff for $5818.76, in accordance with this agreement.

Defendant started making drawings, ordering materials and conducting tests when, on October 27, 1930, or twenty-seven days after it executed the memorandum described, it received a telegram from plaintiff as follows:

> "In view of your failure to make changes with all possible speed as per agreement dated September eighteenth and because of failure of exchangers as originally installed and because these exchangers are becoming steadily worse our clients and ourselves must and do insist on new exchangers that will fulfill all guarantees of original contract and must be built at once Wire today if you agree to supply new exchangers If we fail to hear from you immediately we will be obliged to purchase new exchangers elsewhere for your account."

Subsequent negotiations failed to effect an agreement and defendant was finally advised, on February 18, 1931, that the exchangers were taken down, and plaintiff demanded a settlement.

Defendant asserts that this agreement of September 18, 1930, was founded upon a valuable consideration and created a new and binding contract between the parties, and that plaintiff subsequently breached it. Plaintiff argues that this was merely a memorandum of what the defendant proposed to do to comply with its original contract; that it was without consideration and did not release the defendant from its guarantee of performance.

The general rule is that a consideration is any act which is of benefit to one party and of disadvantage to the other. Weger v. Robinson Nash Motor Co., 340 Ill. 81. Defendant lists as such acts its agreement of September 18th to furnish and weld new channels to the tube sheet, change bolt holes, furnish new bolts and nuts, install slotted bolts with wedges if they were found suitable.

agreed to make these changes "with all possible speed," [illegible] the shut-down of the exchangers should not exceed ten weeks. This memorandum was executed by both parties, defendant signing September 30, 1937, and on that date [illegible] plaintiff [illegible], in accordance with this agreement.

Defendant started making examinations, [illegible] materials and conducting tests when, on October 17, 1937, or seventeen days after it executed the memorandum agreement, it received a telegram from plaintiff as follows:

> "In view of your failure to make changes with all possible speed as per agreement dated September [illegible] and [illegible] of failure of exchangers as originally installed and [illegible] these exchangers are becoming steadily worse our clients [illegible] must and do insist on new exchangers that will [illegible] with guarantees of original contract and [illegible] today if you agree to supply new exchangers [illegible] immediately we will [illegible] for your account."

Subsequent negotiations failed [illegible] and defendant was finally advised, on February [illegible], 1938, that the exchangers were taken down, and plaintiff demanded a settlement.

Defendant asserts that the agreement of September 18, 1937, was founded upon a [illegible] consideration and created a new and binding contract between the parties, and that plaintiff subsequently breached it. Plaintiff argues that this memorandum was [illegible] of what the defendant was bound to do [illegible] its original contract; that it was [illegible] and did not relieve the defendant from its liability as warrantor.

The general rule is that [illegible] is of benefit to the party [illegible]. Roger v. Robinson [illegible]. [illegible] acts its agreement [illegible] in the like event, [illegible] install [illegible].

Plaintiff argues that all of these undertakings include only those things which defendant was already obligated to do under its original contract. This may be so, and were these the only things contained in this agreement, a close question might be presented as to whether there was any consideration.

We are of the opinion, however, that the agreement to pay plaintiff $5818.76 as compensation for its expenses in making repairs was a sufficient consideration. It can hardly be argued that there was no dispute between the parties at this stage of the matter. Plaintiff was asking for payment of over $8,000 and had debited defendant's account with this amount; they compromised on the smaller amount. In U. E. H. & F. Co. v. Ackerman-Quigley P. Co., 236 Ill. App. 111, a check was given in settlement of a controversy between the parties as to the performance of certain stokers guaranteed by plaintiff, defendant retaining a certain amount as a guarantee of performance of the stokers. It was held that all that took place regarding the trouble with the operation of the stokers was merged in the written agreement of settlement, and that the guaranties in the original contract were superseded by those in the settlement agreement. Other cases holding that where a new agreement has been made in the nature of a compromise or settlement of disputes between the parties, such new agreement supersedes the original contract, are McCoy v. Milbury, 87 N. J.L. 697; Weaver v. Emerson-Brantingham Imp. Co., 146 Ark. 379. In Dougherty v. Duckels, 303 Ill. 490, our Supreme court said that a compromise of a disputed claim whereby the claim is extinguished, is a sufficient consideration to support an agreement, and that "Courts will not inquire into the merits of the claim to determine whether it could have been successfully maintained in a suit brought to enforce it." In Page on Contracts (2nd ed.) vol. 4, sec. 2494, the author says:

Plaintiff argues that all of these misrepresentations involve only those things which defendant was already obligated to do under the original contract. This may be so, and care must be taken that nothing contained in this agreement, a close question which we prefer not to whether there was any consideration.

We are of the opinion, however, that the agreement by plaintiff $28,78 as a preparation for the purpose in making repairs was a sufficient consideration. It can hardly be argued that there was no dispute over the parties at this stage of the matter. Plaintiff was seeking for payment of over $1,000, and had denied defendant's account with this account; they compromised on the smaller account. In [illegible] v. [illegible] Co., 236 Ill. App. 111, a case [illegible] is pertinent [illegible] controversy between the parties as to [illegible] of [illegible] stokers guaranteed by plaintiff, [illegible] a certain amount as a percentage of [illegible] stokers. It was held that all that was place regarding the trouble with the operation of the stokers was merely in the nature of negotiation, and that the guarantee in the original contract were substituted by those in the settlement agreement. Other cases [illegible] that where a new agreement has been made in the nature of a compromise or settlement of disputes between the parties, such new agreement supersedes the original contract, see Gray v. [illegible], [illegible] 697; Weaver v. [illegible] Co., [illegible] Ill. App. [illegible] Dougherty v. Dunnels, 203 Ill. [illegible], [illegible] compromise of a disputed [illegible] in a multitude consideration [illegible] "Courts will not inquire [illegible] whether it could have been successfully maintained [illegible] brought to enforce it." In Page on Contracts (2nd ed.) vol. 1, sec. 2404, the author says:

"If a new contract provides for an extension of time, either express or by fair implication, failure to perform within the time fixed by the original contract can not be treated as a breach or as a discharge. *** No action can in such case be maintained on the original contract. *** If a written contract is modified by subsequent oral agreement, an action must be brought upon the contract as modified. An action can not be brought upon the original contract, even if the new contract is broken."

Even if the memorandum of September 18th should be construed not to be a new agreement with reference to the guaranty of performance, yet it is clearly an agreement, for a consideration of money paid to plaintiff, to permit defendant to attempt to remedy defects by doing certain specified things, provided defendant proceeded with all possible speed.

Twenty-seven days after defendant had paid the money plaintiff wired defendant demanding the installation of "new exchangers" to be "built at once," and that if this were not agreed to "today" plaintiff would purchase new exchangers elsewhere. It needs little argument to demonstrate that this was a repudiation of the September 18th agreement. There is some basis for defendant's statement that the evidence shows that Mr. Winkler, president of plaintiff company, had had new exchangers designed some time before his telegram to defendant, indicating that the repudiation was planned some time before October 27th.

Does the evidence show that defendant proceeded to comply with the agreement of September 18th "with all possible speed"? The only evidence on behalf of plaintiff in this respect was the testimony of Mr. Winkler, who said he thought the material for the wedge bolts could be obtained in a week and the bolts made in a few days. He admitted that he never prepared or used such bolts and did not know how long it would take to get material for them. As against this a Mr. Spencer, engineer for the defendant company, testified that it took possibly two days or more to design these wedge bolts; that it would take about three weeks to furnish the new channels

"If a new contract providing for an extension of time, either express or by fair implication, failing to perform within the time fixed by the original contract can not be treated as a waiver or as a discharge. ... No action can be made to substitute an the original contract. ... If a written contract is modified by subsequent oral agreement, an action may be brought upon the contract as modified. An action can not be brought upon the original contract, even if the new contract is void."

Even if the proposition of Dougherty v. Ott should be estimated not to be a new agreement with reference to the necessity of performance, yet it is merely an agreement, for a consideration of money paid by plaintiff, to permit defendant to attempt to remedy defects by doing certain specified things, provided defendant proceeded with all possible speed.

Twenty-seven days after plaintiff had paid the money plaintiff wired defendant demanding the installation of "new engineers" to be "built at once," and that if it were not agreed to "money" plaintiff would abandon the excavation elsewhere. It needs little argument to demonstrate that this was a repudiation of the superior lien agreement. There is nothing in the defendant's argument that the evidence shows that Mr. Thayer, President of plaintiff company, had had new engineers designed some time before the plaintiff, indicating that the construction was planned some time before October 7th.

Does the evidence show that defendant proceeded in accordance with the agreement of September 16th "with all possible speed"? The only evidence of speed or diligence is the testimony of the company of Mr. Tinker. The testimony [illegible] the engineer [illegible] bolts could be obtained in a week [illegible] a few days. [illegible] admitted that a hyper elevator is the [illegible] not know how long it would take to get [illegible] and [illegible] like a Mr. Spencer, engineer for the defendant company, testified that it took possibly two days or more to design these engineers; that it would take about three weeks to finish and for machine

and about a week to burn out the slotted bolt holes; he testified that he had told Mr. Winkler that the wedge bolts had been designed and ordered although they had not been received or tested by October 27th; that the slabs of steel for the new channels had to be ordered specially and might take three to six weeks. The chief draftsman of the defendant testified that he designed the wedge bolts and that to fabricate them would customarily take about five or six weeks; that defendant received them about November 1st and tests were completed about the middle of November, and that he did not know of any way that this work could have been completed in less time. The superintendent of defendant's shop testified to the same effect, saying that the wedge bolts were not standard but had to be made specially. We cannot hold that the conclusion of the trial court in this respect was manifestly against the weight of the evidence.

Defendant made a motion in this court to strike plaintiff's briefs from the files on the ground that they did not comply with rule 7 of this court. That motion was denied for the reasons stated in The People v. Miller, 339 Ill. 637, and not because defendant's motion was not well founded.

Upon the entire record we see no sufficient reason to disagree with the conclusion of the trial court, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

and about a week to turn out the alleged bad money; he testified that he had left at. Finally that the marked bills had been displayed and ordered although they had not been received or seized by Detective Tyler; that the chief of steel for the bank concluded not to be ordered specially and might take there in evidence. The direct testimony of the defendant contention that he declared the marked bills and that to facilitate them would certainly take about five or six weeks; that defendant produced the [illegible] fact and these were completed about six months of [illegible], and that he did not know of any way that this work could have been completed in less time. The cross-examination of defendant's counsel testified to the same effect, saying that the work could have not [illegible] had to be done secretly. The counsel and the prosecution of the trial court in this respect are manifestly against the weight of the evidence.

Defendant made a motion in this court to strike plaintiff's brief from the files on the ground that they do not comply with rule 7 of this court. That motion was taken and the reasons stated in The People v. Miller, 5th ill. App., not requires defendant's motion was very well founded.

Upon the entire record we see no sufficient reason to disagree with the conclusion of the trial court, which is therefore affirmed.

Affirmed.

Matchett and O'Connor, JJ., concur.

38691

AFFILIATED UNDERWRITERS LOAN & FINANCE CO., INC., a corporation,
Appellant,

vs.

WAITS & BAXTER LUMBER CO., a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF ~~CHICAGO.~~

284 I.A. 650

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order vacating a judgment of $453.75 against defendant and quashing the summons. Defendant filed a special appearance to challenge the jurisdiction of the court. The motion to vacate the judgment was supported by an affidavit which denied the right of plaintiff to have an Illinois summons served on the defendant, a corporation resident of Iowa, not doing business in Illinois, and also denied the authority of the person who served the summons and made the return. The affidavit was made in the State of Iowa, County of Blackhawk, and was subscribed and sworn to before a notary public.

The only point made on this appeal is that the certificate of the notary does not show that he was authorized to administer oaths in the State of Iowa. We had occasion to consider this same question in the recent case of Christensen v. Blinstrup, No. 38583, opinion filed March 2, 1936. We there said that chap. 51, pars. 57 and 58 of Ill. State Bar. State., provide that we shall take judicial notice of the laws enacted by any state or territory of the United States. It is conceded by counsel for plaintiff that under the laws of the State of Iowa notaries public in that State are authorized to administer oaths. It follows, therefore, that the affidavit was properly sworn to before a duly authorized officer.

As this is the only point presented upon this appeal, the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

38691

AFFILIATED UNDERWRITERS LOAN & FINANCE CO., INC., a corporation,
Appellant,

vs.

WAITE & BARTON LUMBER CO., a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

264 I.A. 650

MR. [illegible] JUSTICE [illegible]
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order vacating a judgment of $453.79 against defendant and quashing the summons. Defendant filed a special appearance to challenge the jurisdiction of the court. The motion to vacate the judgment was supported by an affidavit which denied [illegible] of plaintiff [illegible] an Illinois summons served on the defendant, a corporation organized in Iowa, was doing business in Illinois, [illegible] the affidavit of the person who served the summons [illegible]. The affidavit was made in the State of Iowa, [illegible], and was subscribed and sworn to before a notary public.

The only point made [illegible] is that the certificate of the notary does not show that he was authorized to administer oaths in the State of Iowa. [illegible] question in the recent case of [illegible], Gen. No. [illegible], opinion filed March [illegible], 1932. [illegible] pars. 57 and 58 of Ill. State Bar Stats. [illegible] judicial notice of the laws [illegible] of the United States. It is [illegible] under the laws of the State of Iowa notaries [illegible] are authorized to administer oaths. [illegible] the affidavit was [illegible].

As this is the only point [illegible], the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

38724

HARRY R. MORRIS,
Appellant,

vs.

FAITH MANUFACTURING COMPANY,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

53

284 I.A. 650

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover something over $2000 claimed to be due upon a written contract, whereby defendant agreed to pay plaintiff certain royalties in connection with the manufacture and sale of a faucet; upon trial by the court the issues were found for defendant and plaintiff appeals from the judgment.

The defense asserts an executed parol modification of the contract sued on. The contract or agreement executed by the parties was dated May 19, 1932; it recites that plaintiff is the owner of letters patent of the United States on a faucet and sundry tools and dies used in making it. The defendant was given sole and exclusive right to manufacture and distribute the faucets in the United States, Canada, and all foreign countries; defendant agreed to pay for this a royalty of 5% of its net selling price for all faucets manufactured under this patented process, to be paid for monthly on sales made during the preceding month. Then follows the provision which defendant says was waived by agreement. Defendant guaranteed that the royalties of the plaintiff should not be less than $1250 for the first year and $2000 for each year thereafter. There was a further provision that if defendant failed to carry out the terms of the agreement, plaintiff, upon giving defendant three months notice, could declare the contract null and void. Plaintiff delivered certain dies to be used in the manufacture of the faucets, retaining the right of property in such dies. Defendant was given the right to make improvements in the dies as might be needed.

HARRY H. BOHLIN,
Appellant,

vs.

WAITE MANUFACTURING COMPANY,
a Corporation,
Appellee.

Although there is some evidence to the contrary, the court could properly conclude that the greater weight of the evidence showed that the provision to guarantee a minimum royalty per year was waived by agreement of the parties. It was established that shortly after defendant started to manufacture the faucets and place them on the market for sale, it discovered other similar faucets on the market for sale, and particularly faucets made by a California firm. In September, 1932, defendant had a conference with plaintiff concerning this. The president of defendant company, Mr. Faith, and others connected with defendant company, showed plaintiff the faucets made by the California company and cut one in two in order to show that the California company was using the same process. Plaintiff was asked if he had ever heard of this California faucet before and answered that he knew "about this," and when asked why he had not told defendant about it before defendant signed the contract, plaintiff replied that he had no money to continue the manufacture and felt that defendant company could handle the faucet, and that if he told defendant there was a similar faucet already on the market defendant "would not have accepted my proposition." Defendant objected to continuing with the contract; Mr. Faith told plaintiff he could have the dies "and take them; I would not continue on account of the other one (faucet) being on the market and pay royalties; that could not be done." But plaintiff requested them to forget about the guarantee of a minimum royalty, and that he would be satisfied if defendant would continue manufacturing and pay him the royalty on every faucet sold. Plaintiff also promised to stop the California concern from manufacturing the faucet. Apparently plaintiff did go to California in an attempt to stop the California concern.

There was a subsequent meeting of plaintiff and a number of other men in defendant's office. Plaintiff reported that he had no

Although there is some evidence in the contract, the court could properly conclude that the jeans's worth of the evidence showed that the operation of manufacture a minimum royalty for each was waived by agreement of the parties. It was established that shortly after defendant started to manufacture the jeans in his place down on the barrel for sale, it discovered other similar jeans on the market for sale, and particularly jeans made by a California firm. In September, 1937, defendant had a conference with plaintiff concerning this. The president of defendant company, Mr. Weiss, and three corporate officers, defendant's witnesses, showed plaintiff the jeans and stated that defendant company was cut one in two in order to show that the defendant company was using the same process. Plaintiff replied, "I've had ever heard of this California jeans before and I wonder how I'm going to know about this," and then asked why he had not told Levi's about it before defendant began the manufacture. Plaintiff testified that he had no money to enforce the manufacture [illegible] could handle the amount, and [illegible] similar lawsuit already on [illegible] and "would not have accepted my proposition." Defendant [illegible] contract; Mr. Weiss [illegible] jeans; I could not [illegible] below on the market and [illegible] plaintiff [illegible] royalty, and [illegible] manufacturing and [illegible] tiff also [illegible] the lawsuit. [illegible] to stop the California [illegible]

There was a conference between [illegible] other men in defendant's office. [illegible]

money to start suit against the California infringer, and was told by defendant's president that his company was "ready to give up. It does not pay us to continue manufacturing; I am through with the article. There isn't enough. We can't get the calls because of the fact that this competition faucet was on the market and ruining the market for us." To which plaintiff requested that defendant should "Do the best you can," and continue to manufacture and sell the faucet "as good as you can under the present conditions. I will go along with you and you can pay me for every faucet you sell from time to time and I will be satisfied." There was abundant corroborating testimony that the guarantee of a minimum royalty of $1250 and $2000 a year was waived.

Plaintiff invokes the general rule that a parol agreement to vary a contract under seal is inadmissible to defeat the recovery on the original contract. This is true as a general proposition, but in Snow v. Griesheimer, 220 Ill. 106, where this general proposition was presented, it was held that while this rule should be enforced in every case to which it applies, it is not to be extended to other cases to which it does not properly apply, and that "If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed." This rule has been followed in a number of cases. Levy v. Greenberg, 261 Ill. App. 541, involved an oral agreement to reduce the rent from the amount stipulated in a written lease; it was there held that as it appeared that the agreement for the reduced rental had been executed, the landlord could not recover the original amount stated in the written lease. See also Doyle v. Dunne, 144 Ill. App. 14; Kafka v. Peterson, 257 Ill. App. 625. In Galveston v. Galveston City R. Co., 46 Tex. 435, the defendant was under contract to keep a roadbed in the City of Galveston in good repair and at a certain fixed level; the City

money to start suit against the plaintiffs [illegible], and was told by defendant's president that his company was "ready to give up. It does not pay us to continue manufacturing; I am [illegible] the article. There isn't enough." He said, [illegible] the [illegible] of the fact that this competition issues was on the market and nothing [illegible] market for us." To which plaintiff replied [illegible] "So the best you can," and continue to manufacture and sell the fluoset "as good as you can under the present conditions. I will go along with you and you can pay me for every fluoset you sell [illegible] time to time and I will be satisfied." [illegible] [illegible] testimony that the guarantee of a minimum royalty of $1000 and $3000 a year was waived.

Plaintiff invokes the general rule that a good consideration in every a contract under seal is inadmissible to defeat the recovery on the original contract. This is true on a general demurrer, but in Bmen v. [illegible], [illegible], where the general [illegible] was presented, it was held that [illegible] to [illegible] in every case to which it applies. [illegible] case in which it does not [illegible], and that "if the parties have executed the contract as [illegible], so that nothing remains to be done by either party, it is no longer executory [illegible] as executed will not be disturbed." [illegible] a number of cases. Perry v. [illegible] [illegible] actual agreement to release [illegible] written instrument in a written issue; it was [illegible] that [illegible] ment for the reduced [illegible] recover the original [illegible] also Doring v. Ramos, 174 [illegible] App. 624. In [illegible] v. [illegible], [illegible] defendant was under contract to keep a [illegible] salvaged in good repair and at a certain time [illegible]; the only

brought suit, alleging failure by defendant in this respect; defendant alleged that the City subsequently by ordinance relieved defendant from this undertaking; judgment was for defendant, which the Supreme court affirmed, saying in substance that if a contract has been obtained by mistake, or if "through change of circumstances it is deemed to operate oppressively," an agreement to modify the contract is not invalid for want of consideration.

It is a clear inference from the evidence in the instant case that defendant would not have entered into the contract if it had known that a competing company was selling the same type of faucet. The fact that plaintiff concealed this from the defendant for fear defendant would not enter into the agreement, gives an additional reason to support the finding that the contract was modified by annulling the guarantee of a minimum royalty. The trial court in its opinion correctly stated that the desire of plaintiff to have his goods manufactured and put upon the market, with the resulting loss to defendant as indicated by the evidence, is a sufficient consideration for the modification, under the general rule that an act which is of benefit to one party or a disadvantage to another constitutes a sufficient consideration to support the modified contract. Morris v. Masters, 349 Ill. 455.

There was evidence tending to show that the contract as modified was executed. For almost two years after the modification was made defendant remitted monthly, by check, royalties on the sales actually made; some of these checks are marked in full; a check dated in March, 1934, is marked, "in full of all prior"; the check in July, 1934, is endorsed, "in full to July 1st"; plaintiff received, endorsed and collected the amounts of these checks, and during all this time never made any complaint or demand upon defendant for any other payments. Plaintiff is therefore estopped, after having thus

brought suit, alleging failure by defendant to pay interest; the defendant alleged that the city wrongfully by ordinance relieved defendant from this burdensome; judgment was for defendant, which the Supreme court affirmed, holding in substance that if a contract has been obtained by mistake, or if through change of circumstances it is deemed to operate oppressively," as [illegible] to modify the contract is not invalid for want of consideration.

It is a clear inference from the evidence in the instant case that defendant would not have entered into the contract if it had known that a competing company was selling the same type of tubes. The fact that plaintiff [illegible] from the defendant for less defendant would not enter into the contract, lends an additional reason to support the finding that the contract was modified by annulling the obligation of a minimum royalty. The trial court in its opinion correctly stated that [illegible] of plaintiff to have kept its promise [illegible] the contract, with the resulting loss to defendant is immaterial to the evidence, is a sufficient consideration for the modification. Many [illegible] rule that an act which it is not bound to do or a forbearance to another constitutes a valid [illegible] consideration to support the modified contract. Fourth [illegible], [illegible].

There was evidence to [illegible] contract as modified was executed. For [illegible] the first [illegible] was made [illegible] by [illegible], [illegible] the [illegible] actually made; [illegible] dated in [illegible], 1919, in [illegible]. The [illegible] was made in July, 1919, [illegible]. "It [illegible] in July 1919; [illegible] received, endorsed and [illegible] the month of [illegible], [illegible] this time never made any complaint or demand upon defendant for any other payments. Liability is conclusive evidence, after [illegible] that

acquiesced in the modified agreement for so long, to invoke the terms of the original contract.

Plaintiff testified that in December, 1934, he wrote defendant he was going to cancel the contract. According to defendant's answer filed in this case, plaintiff called at defendant's place of business about February 25, 1935, and was informed that defendant would not pay plaintiff any more money, and thereupon defendant returned to plaintiff all the dies belonging to him and the contract was declared forfeited, null and void.

In view of our holding that the finding of the trial Judge in favor of the defendant was right, it is unnecessary to pass upon the point presented on the cross-appeal by defendant.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

acquiesced in the modified agreement (or in fact, in lieu of the terms of the original contract).

Plaintiff testified that in December, 1913, he agreed to lend the defendant the money to cancel the contract. According to defendant's answer filed in this case, plaintiff [illegible] at defendant's place of business about January 15, 1914, and [illegible] defendant would not see [illegible] any more [illegible]. [illegible] defendant returned to plaintiff all the [illegible] the contract was declared [illegible], said [illegible].

In view of our holding that the [illegible] in the trial court in favor of the defendant was right, it is unnecessary to [illegible] upon the point presented on the [illegible] by defendant.

For the reasons [illegible] the judgment is affirmed.

AFFIRMED.

Batchelt and O'Connor, JJ., concur.

38579

WILLIAM L. O'CONNELL, Receiver of Morton Grove Trust and Savings Bank, a Banking Corporation,
Appellee,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

284 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit by the receiver against Ernest H. Kruse and the American Surety Co. of New York on their bond delivered to the Morton Grove Trust & Savings Bank on April 8, 1926, and upon trial by the court, there was a finding against Kruse and the Surety Co. in the sum of $10,284.52, with interest computed at $2,781.16, making a total sum of $13,065.68, for which judgment was entered.

It is contended by the Surety company the court erred in not holding the bank failed to comply with conditions precedent to liability set forth in the bond which required it to give notice to the Surety company within ten days and file a claim in writing within three months after the discovery of loss; in failing to hold defendant's liability on the bond terminated, as a matter of law, prior to the misappropriations for which defendant was held liable, in failing to allow credit for $953.73, which, it is claimed, Kruse repaid to the bank January 20, 1931; in refusing to allow credits for the sum of $17.89 on account of a deposit by Kruse, and $30.58 on account of a deposit by one Zinzer; in including in the amount allowed an item of $1,000 on account of a transaction of Kruse with a customer named Oszakowski; and in allowing interest on the several items found to be due.

Plaintiff contends the trial court erred in allowing defendant a credit of $3100 on account of alleged payments made by

38579

WILLIAM I. O'CONNELL, Receiver of Morton Grove Trust and Savings Bank, a Banking Corporation, Appellee,	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
vs.	
AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Appellant.	284 I.A. 530

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit by the receiver against Kruse and Kruse and the American Surety Co. of New York on their bond delivered to the Morton Grove Trust & Savings Bank on April 8, 1926, and upon trial by the court, there was a finding against Kruse and the Surety Co. in the sum of $10,284.82, with interest computed at $2,781.16, making a total sum of $13,065.98, for which judgment was entered.

It is contended by the Surety company the court erred in not holding the bank failed to comply with conditions precedent to liability set forth in the bond which required it to give notice to the Surety company within ten days and file a claim in writing within three months after the discovery of loss; in failing to hold defendant's liability on the bond terminated, as a matter of law, prior to the misappropriations for which defendant was held liable, in failing to allow credit for $988.76, which, it is claimed, Kruse repaid to the bank January 20, 1931; in refusing to allow credits for the sum of $17.50 on account of a deposit by Kruse, and $30.38 on account of a deposit by one Ainsley; in including in the amount allowed an item of $1,000 on account of a transaction of Kruse with a customer named Gerakowski; and in allowing interest on the several items found to be due.

Plaintiff contends the trial court erred in allowing defendant a credit of $3100 on account of alleged payments made by

Kruse to the bank January 3, 1930; however, plaintiff filed no notice of cross-appeal, and, we think, this contention may not be considered. First National Bank v. School District No. 64, 278 Ill. App. 190.

By the terms of the bond defendants bound themselves to pay to the bank -

" * * * such pecuniary loss, not exceeding Twenty Thousand ($20,000.00) Dollars, as the latter shall have sustained of money or other personal property (including that for which the Employer is responsible), by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication on the part of the Employe, directly or through connivance with others, while in any position or at any location in the employ of the Employer; this suretyship to begin April 17th, 1926, and to end (a) with the date of the discovery by the Employer either of loss hereunder or of dishonesty on the part of the Employe, or (b) with the date of the retirement of the Employe from the service of the Employer, or (c) with the date of the termination of the suretyship by the Surety or the Employer in the manner hereinafter set forth in clause 7.

PROVIDED, HOWEVER:

1. That loss be discovered during the continuance of this suretyship or within the fifteen months immediately following the termination thereof, and that notice of such loss be delivered to the Surety at its home office in the City of New York within ten days after such discovery.

2. That claim, if any, be submitted by the Employer in writing, showing the items and the dates of the losses, and be delivered to the Surety at its home office within three months after such discovery, and that the Surety shall have two months after claim has been presented in which to verify and to make payment."

The contention of defendant that notice of loss was not given and proofs filed in apt time cannot be sustained. As we read the bond, such notice was required and proof of loss necessary only upon the discovery of pecuniary loss. We find no evidence in the record of actual knowledge of loss by the obligee prior to the examination of the books of the bank by an accountant employed by the receiver appointed after the bank had been closed by the state auditor of public accounts on September 10, 1931. It may plausibly be argued that such pecuniary loss would have been discovered by the exercise of intelligent and well directed diligence on the part of the bank officials; but the bond does not impose such requirement or condition, and in the absence thereof the law does not

Kruse to the bank January 2, 1930; however, plaintiff filed no notice of cross-appeal, and, we think, this contention may not be considered. First National Bank v. National Surety Co., 278 Ill. App. 190.

By the terms of the bond defendants bound themselves to pay to the bank -

" * * such pecuniary loss, not exceeding twenty thousand ($20,000.00) dollars, as it shall have sustained of money or other personal property (including that for which the Employer is responsible), by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misapplication on the part of the Employee, singly or through conniving with others, while in any position or at any location in the employ of the Employer; this security to begin April 17th, 1928, and to end (a) with the date of the discovery by the Employer either of loss hereunder or of dishonesty on the part of the Employee, or (b) with the date of the retirement of the Employee from the service of the Employer, or (c) with the date of the termination of the suretyship by the Surety or the Employer in the manner hereinafter set forth in clause 7.

PROVIDED, HOWEVER:

1. That loss be discovered during the continuance of this suretyship or within the fifteen months immediately following the termination thereof, and that notice of such loss be delivered to the Surety at its home office in the City of New York within ten days after such discovery.

2. That claim, if any, be submitted by the Employer in writing, showing the items and the date of the loss, and be delivered to the Surety at its home office within three months after such discovery, and that the Surety shall have two months after claim has been presented in which to verify and to make payment."

The contention of defendants that notice of loss was not given and proofs filed in not time can not be sustained. As we read the bond, such notice was required and proof of loss necessary only upon the discovery of pecuniary loss. We find no evidence in the record of actual discovery of loss by the bank prior to the examination of the books of the bank by an account that employed by the receiver appointed after the bank had been closed by the state auditor of public accounts on September 10, 1928. It may plausibly be argued that such pecuniary loss would have been discovered by the exercise of intelligence and interested diligence on the part of the bank officials; but the bond does not impose such requirement or condition, and in the absence [illegible] of the law does not

require diligence on the part of the bank as a condition precedent to liability. Fidelity & Guaranty Co. v. First Nat'l Bank of Dundee, 233 Ill. 475; Minor v. Mechanics' Bank of Alexandria, 7 L. Ed. 47, 1 U. S. 445; McShane & Rodgers v. Howard Bank, 73 Md. 135; Fidelity & Deposit Co. v. Courtney, 186 U. S. 343. Moreover, the question of whether notice of loss and proofs were delivered in compliance with the provision of the bond, presented an issue of fact (Tonsor v. Fidelity & Deposit Co., 173 Ill. App. 383; Western Cold Storage Co. v. New Amsterdam Casualty Co., 262 Ill. App. 133; American Surety Co. of New York v. Pauly, 170 U. S. 133), and the trial court having found in favor of plaintiff on this issue, the finding will not be set aside unless it is manifestly and clearly against the weight of the evidence. McCracken v. First Nat'l Bank of Wheaton, 204 Ill. App. 20; Bird v. Louer, 272 Ill. App. 522; American Surety Co. of New York v. Pauly, 170 U. S. 133, 42 L. Ed. 977. We cannot hold that the finding in this case is against the evidence.

Defendant, however, earnestly contends that the bank had knowledge of dishonesty on the part of Kruse prior to the misappropriation of funds on his part, for which it has been held liable under the bond, and defendant contends that under clause "a" of the bond its liability thereon was ended prior to these misappropriations, and this is, we think, the controlling question of fact in the case.

The third amended bill of particulars charged wrongful appropriation by Kruse of moneys of the bank in various amounts beginning April 12, 1929, and ending April 10, 1931. Defendant says that as early as January 10, 1929, the bank discovered dishonesty on the part of Kruse, and that by the terms of the bond defendant's liability was thereby terminated. Defendant further says:

require diligence on the part of the bank as a condition precedent to liability. Liberty & Guaranty Co. v. Silver State Bank of Dundee, 243 Ill. 475; Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46, 1 L. Ed. 345; Kosmos & Rodgers v. Merced Bank, 70 Cal. 158; Liberty & Deposit Co. v. Courtney, 166 Ill. 343. Moreover, the question of whether notice of loss and proofs were delivered in compliance with the provision of the bond, presented an issue of fact (Tomson v. Liberty & Deposit Co., 172 Ill. App. 388; Western Gold Storage Co. v. New Amsterdam Casualty Co., 258 Ill. App. 138; American Surety Co. of New York v. Pauly, 170 U. S. 133), and the trial court having found in favor of plaintiff on this issue, the finding will not be set aside unless it is manifestly and clearly against the weight of the evidence. Mortenson v. Liberty Mutual Ins. Co. of Wisconsin, 204 Ill. App. 3; Eliel v. Morris, 172 Ill. App. 321; American Surety Co. of New York v. Pauly, 170 U. S. 133, 42 L. Ed. 977. We cannot hold that the finding in this case is against the evidence.

Defendant, however, earnestly contends that the true and knowledge of dishonesty on the part of Grace prior to the misappropriation of funds on his part, for which it has been held liable under the bond, and defendant contends that under the "2" of the bond its liability therefor was made prior to these misappropriations, and this is, we think, the controlling question of fact in the case.

The bond sued on bill of [illegible] stated warranted misappropriation by Grace of moneys of [illegible] beginning April 16, 1929, and ending April 16, 1930. Defendant says that as early as January 10, 1930, the bank discovered dishonesty on the part of Grace, [illegible] the bank and defendant's liability was thereby terminated. Defendant further says:

"If there is such a thing as re-current death, this bond again terminated on December 3, 1929, and on October 14, 1930, when the bank had actual knowledge of dishonesty on the part of Kruse from reading State Auditor's reports of examination, which showed indebtedness of Kruse to the bank, when in fact he was not authorized to have any indebtedness."

During the time covered by the amended bill of particulars Kruse was either the assistant cashier or the acting cashier of the bank. He kept the records, books and files in the usual course of its business and was in charge of them. He kept the records of the meetings of the board of directors, acting as secretary. August F. Poehlmann, Henry H. Dilg, Ernest H. Kruse, Roland F. Dilg, Henry Loutsch, Herbert A. Dilg, Guy W. French, Adolph Poehlmann, Victor A. Platz, William Schnur, Fred M. Krueger and Jake Baumhardt were during all, or part, of this time, directors of the bank. During part of the time August Poehlmann was president and Henry H. Dilg vice-president. From January 1, 1931, to September 10, 1931, when the bank was closed by the auditor of public accounts, Henry H. Dilg acted as president. Apparently none of them were bankers. Henry H. Dilg ran a roadhouse nearby. Baumhardt was an automobile salesman with an office a half a mile east of the bank. He went to the bank to make deposits but says he never went behind the counter and never looked at the books. Guy French was a traveling salesman who signed reports at the request of Kruse without reading them. He was out of town much of the time. Henry Loutsch was a retired butcher. The reports were presented to him by Kruse and he signed them upon the assurance of Kruse that the same were correct. August Poehlmann was an oil salesman. Victor Platz, another director, ran a feed mill in Morton Grove. Herbert Dilg ran a garage business and says he signed the reports as a matter of form.

Defendant says the bank had knowledge of the dishonesty of Kruse prior to the misappropriations, for which defendant has been held liable, in several ways. In compliance with the request of the state auditor and pursuant to the provisions of the statute (Ill.

"If there is any such thing as re-[illegible] again terminated on December 3, 1929, and on October [illegible], 1930, when the bank had actual knowledge of insolvency or [illegible] from reading State Auditor's reports of examination, which [illegible] indebtedness of Kruse to the [illegible] liquidated or-ized to have any indebtedness."

During the time covered by the amended bill of particulars Kruse was either the assistant cashier or the acting cashier of the bank. He kept the records, books and files in the usual course of its business and was in charge of them. He kept the records of the meetings of the board of directors, acting as secretary. August F. Poehlmann, Henry H. Dilg, Ernest A. Kruse, Roland A. Dilg, Henry Doutsch, Herbert A. Dilg, Guy W. Kruse, Adolph Poehlmann, Victor A. Plate, William Conner, Fred L. Krueger and Jake Eberhardt were during all, or part, of this time, directors of the bank. During part of the time August Poehlmann was president and Henry H. Dilg vice-president. From January 1, 1921, to September 10, 1926, when the bank was closed by the auditor of public accounts, Henry H. Dilg acted as president. Apparently [illegible] of these were [illegible]. Henry H. Dilg ran a roadhouse in [illegible]. [illegible] was an [illegible] salesman with an office a [illegible] the bank. [illegible] to the bank to make deposits but [illegible] never [illegible] and never looked at the books. [illegible] was a [illegible] who signed reports at the request of [illegible] them. He was out of town much of the time. [illegible] button. The reports were prepared [illegible] by [illegible] them upon the assurance of [illegible] were [illegible]. August Poehlmann was an oil salesman. Victor Plate, another director, ran a feed mill in Morton Grove. Herbert Dilg ran a [illegible] business and says he signed the reports as a matter of form.

Defendant says the bank had knowledge of the insolvency of Kruse prior to the misappropriations, for which he [illegible] has been held liable, in several ways. In compliance with the request of the state auditor and pursuant to the provisions of the statute (Ill.

State Bar Stats. 1935, chap. 16a, sec. 7,) the bank submitted call reports to the state auditor every three months. These reports were in writing, are in evidence, and show that Kruse was indebted to the bank at the time of these different reports in amounts varying from $1400 to $5434.86. Defendant says that these loans were not authorized by the board of directors, and that in making the same Kruse was guilty of dishonesty, knowledge of which must be imputed to the bank. Defendant says that the reports were the reports of the bank, and not simply of the officials of the bank, and that the bank is now estopped to deny knowledge of their contents. This contention of defendant assumes that there was no authorized loan to Kruse during this time. Russell Wheeler, an expert accountant, at one time so testified but afterward corrected his testimony and said that the records of the bank showed that on August 14, 1928, a loan was authorized to Kruse in the amount of $2200 and that Kruse thereafter paid upon this loan the sum of $200. This appears to have been the loan which is included in the subsequent call reports to the auditor, although it is in some of them incorrectly reported as $1400 instead of $2000. In the call reports of September 24, 1930, and December 31, 1930, the indebtedness of Kruse was reported as $3050, in that of March 25, 1931, $5434.86, and in that of June 30, 1931, $3554.69. On August 12, 1931, Kruse executed a note for $3502.16 to the order of the bank, which seems to have been authorized by the board of directors. Notwithstanding the confused statements of some of the directors, it is apparent that during the period of time covered by these reports, Kruse did have authorized loans from the bank. All of the directors who testified denied knowledge, during this time, of unauthorized loans to him, and in view of the facts we think the court could reasonably find they were without knowledge of any dishonest act on his part, within the meaning of the bond. As we have already seen, negligence (even

State Bar State, 1935, chap. 1ca, sec. V.) the bank submitted call reports to the state auditor every three months. These reports were in writing, are in evidence, and show that there was loaned to the bank at the time of these different reports in amounts varying from $1400 to $5434.56. Defendant says that these loans were not authorized by the board of directors, and took in making the same Kruse was guilty of dishonesty, knowledge of which must be imputed to the bank. Defendant says that the reports were the reports of the bank, and not simply of the officer in the bank, and that the bank is now estopped to deny knowledge of their contents. This contention of defendant commences that in the no authorized loan to Kruse during this [illegible]. [illegible] Wickersham, an expert accountant, at one time so testified that [illegible] corroborated his testimony and said that the records of the bank showed that on August 14, 1929, a loan was authorized to Kruse in the amount of $2200 and that Kruse thereafter paid upon this loan the sum of $200. This appears to have been the loan which is included in the subsequent call reports to the auditor, although it is in some of them incorrectly reported as $1400 instead of $2000. In the call reports of September 24, 1930, and December 31, 1930, the indebtedness of Kruse was reported as $3050, in that of March 13, 1931, $5434.56, and in that of June 30, 1931, $4834.56. On August 3, 1931, Kruse executed a note for $3502.15 [illegible] which seems to have been authorized by the board of directors. Notwithstanding the contrary statements of some of the directors, it is undoubted that during the period of time covered by these reports, Kruse did have authorized loans from the bank. All of the directors [illegible] denied knowledge, during this time, of unauthorized loans to him, and in [illegible] of the foregoing facts the court could [illegible] find they were without knowledge of any [illegible] act within the meaning of the bond. As we have already [illegible], [illegible] since (even

gross negligence) on the part of the directors, would not relieve defendant of its liability.

In connection with these call reports defendant relies much upon Eland State Bank v. Mass. Bonding & Insurance Co., 165 Wis. 493, 162 N. W. 662, but the facts there are clearly distinguishable, in that the surety was there exonerated upon the ground that the official charged with misappropriation was not guilty. Then too, by the terms of the bond there sued on the plaintiff bank agreed to examine the accounts of the insured cashier twice a year, and plaintiff had certified to defendant that the books had been examined and found to be correct in every respect. Here, the items upon which fraud is charged against Kruse do not appear in the call reports and the surety has not been found to be obligated on account of any of the loans appearing in these reports.

Defendant also argues that knowledge of dishonesty of Kruse must be imputed to the bank by reason of the letters of the auditor of public accounts which were transmitted to defendant bank after each examination by the auditor. There is nothing in the letters, however, which asserts any dishonest act on the part of Kruse. The letters call attention generally to the large loans made to the directors, officers and employees of the bank, but do not call particular attention to the indebtedness of Kruse. They do not impute dishonesty to him or to any other person.

Again, it is urged that knowledge of the dishonesty of Kruse must be imputed to the bank because of the testimony of Henry H. Dilg, president to the effect that he examined the books of the banks from time to time after he became president. He testified positively, however, that he never knew or discovered any fraudulent transactions on the part of Kruse; that he was never notified by the state auditor's office, nor by anyone else, that Kruse was guilty of fraudulent transactions, and that he received that

gross negligence) on the part of the directors, would not relieve defendant of its liability.

In connection with these call reports defendant relies much upon Miami State Bank v. Mass. Fonding & Insurance Co., 165 Ia. 493, 162 N. W. 652, but the facts there are clearly distinguishable, in that the surety was there exonerated upon the ground that the official charged with misappropriation was not guilty. Then too, by the terms of the bond there sued on the plaintiff bank agreed to examine the accounts of the insured oftener than twice a year, and plaintiff had certified to defendant that the books had been examined and found to be correct in every respect. Here, the items upon which fraud is charged against Kruse do not appear in the call reports and the surety has not been found to be obligated on account of any of the loans appearing in these reports.

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Again, it is urged that knowledge of the dishonesty of Kruse must be imputed to the bank because of the testimony of Henry C. Dill, president to the effect that he examined the books of the banks from time to time after he became president. He testified positively, however, that he never knew or discovered any fraudulent transactions on the part of Kruse; that he was never notified by the state auditor's office, nor by anyone else, that Kruse was guilty of fraudulent transactions, and that he received that

information after the appointment of a receiver for the bank. The books were at all times in balance and the dishonesty of Kruse and the losses thereby were established only through an examination by expert accountants.

Defendant next contends that notice of the dishonesty of Kruse must be imputed to the bank by reason of an interview with directors and officers of the bank and the auditor of public accounts a few days before the bank closed September 10, 1931. It may be that the bank at that time had knowledge, or at least very strong suspicion, that Kruse was guilty of fraudulent acts, but the transactions out of which defendant's liability has been found, occurred prior to that time, and knowledge of the directors of any dishonest act could not terminate the liability of defendant as to these items. As we have already said, they had no evidence of actual pecuniary loss and therefore their knowledge of Kruse's dishonesty at this time was wholly immaterial. We agree with the finding of the trial court that under the evidence the bank did not have knowledge of any dishonesty on the part of Kruse such as would terminate the bond and justify a finding of non-liability.

We do not think there is any evidence in the record from which the court could have made a finding for defendant of non-liability. There is abundant evidence of negligence on the part of individual directors and incapacity so far as tending to the business of the bank is concerned. The officers and directors were neither capable nor vigilant. Indeed, the evidence tends to show that the entire management of the bank was committed to Kruse, in whom, however, apparently the other directors had full confidence. There was no provision in the bond which required the directors to be diligent in watching Kruse, and there is no rule of law, in the absence of such provision in the bond, which would release defendant because the directors negligently relied upon the honesty

information after the appointment of a receiver for the bank. The books were at all times in balance and the discovery of Kruse and the losses thereby were established only through an examination by expert accountants.

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We do not think there is any evidence in the record from which the court could have made a finding for defendant on non-liability. There is abundant evidence of negligence on the part of individual directors and inexperience on their part in the business of the bank is concerned. The officers and directors were neither capable nor vigilant. Indeed, the evidence tends to show that the entire management of the bank was committed to Kruse, in whom, however, apparently the other directors had full confidence. There was no provision in the bond which required the directors to be diligent in watching Kruse, and there is no rule of law, in the absence of such provision in the bond, which would release defendant because the directors negligently relied upon the honesty

of the official whose integrity defendant had insured. It is one thing to have knowledge that a trusted official is dishonest. It is quite another to have suspicions that he may not be honest, and quite another, even after knowledge of dishonesty, to know that there has been a loss to the institution as a result of it. No one of the directors, so far as the evidence shows, was an accountant, and the positive knowledge of dishonesty on the part of Kruse and of loss to the bank thereby was determined finally only after weeks of work by an expert accountant on the books. Indeed, even now some of the items are in dispute between the parties to this litigation. Courts are reluctant to permit the party writing an insurance bond to escape liability because of neglect by directors or other officials, or because of the connivance of such directors or officials with the bonded employee. Minor v. Mechanics Bank of Alexandria, 26 U.S. 46; American Surety Co. v. Pauly, 170 U. S. 133; Fidelity & Deposit Co. v. Courtney, 186 U. S. 343; Gunsul v. American Surety Co., 308 Ill. 312.

We hold that defendant was not released by reason of any knowledge on the part of the bank of any dishonest act on the part of Kruse; that notice of pecuniary loss and proofs thereof were submitted in apt time, and that defendant is liable.

Defendant also contends that it is entitled to a deduction of $953.73 because of a credit in that amount entered on the general loans and discounts ledger of the bank January 20, 1931. On the same day an entry on the liability ledger of Kruse was made, and a debit in the same amount appears on the transit account of the general ledger. The transit account was an account maintained by the bank against which checks drawn on out-of-town banks were charged. It was the custom of the bank, when a transaction occurred in which an out-of-town check or similar item was involved, to give the particular customer immediate credit and charge the item to this

of the official whose integrity defendant had insured. It is one thing to have knowledge that a trusted official is dishonest. It is quite another to have speculations that he may not be honest, and quite another, even after knowledge of dishonesty, to know that there has been a loss to the institution as a result of it. No one of the directors, so far as the evidence shows, was an accountant, and the positive knowledge of dishonesty on the part of Kruse and of loss to the bank thereby was determined finally only after weeks of work by an expert accountant on the books. Indeed, even now some of the items are in dispute between the parties to this litigation. Courts are reluctant to permit the party writing an insurance bond to escape liability because of neglect by directors or other officials, or because of the connivance of such directors or officials with the bonded employee. Miner v. Mechanics Bank of Alexandria, 28 U.S. 46; American Surety Co. v. Pauly, 170 U. S. 133; Fidelity & Deposit Co. v. Courtney, 186 U. S. 342; Guenzel v. American Surety Co., 302 Ill. 312.

We hold that defendant was not released by reason of any knowledge on the part of the bank of any dishonest act on the part of Kruse; that notice of pecuniary loss and proofs thereof were submitted in apt time, and that defendant is liable.

Defendant also contends that it is entitled to a deduction of $953.73 because of a credit in that amount entered on the general loans and discounts ledger of the bank January 20, 1921. On the same day an entry on the liability ledger of Kruse was made, and a debit in the same amount appears on the transit account of the general ledger. The transit account was an account maintained by the bank against which checks drawn on out-of-town banks were charged. It was the custom of the bank, when a transaction occurred in which an out-of-town check or similar item was involved, to give the particular customer immediate credit and charge the item to this

transit account and then send the item to the out-of-town bank for collection. When the item was paid the transit account would be credited and the cash account or some other appropriate account would be debited with the amount received.

Wheeler, an accountant, testifying for plaintiff, said that if something was not received by the bank after a charge to the transit account, that account would be thrown out of balance. This bank account was not out of balance, but Wheeler was not able to identify the specific entry credited to this particular item. He thought possibly the credit was in an item of $2800, which was credited at a later time. He was not able to find any "wash" entry or any juggling. The entries indicated that actual money, or something else, came back into the bank to offset the charge of $953.73 against the transit account, and Wheeler at first said that in his entire examination he did not find anything to contradict that view. He could find nothing improper about it, and that if plaintiff were permitted to recover for this item, it would have to be credited to profit. This testimony was later modified by a statement of the witness that there was no record in the bank tending to show that Kruse ever deposited this sum in the bank. There was no debit ticket appropriate to the transit account for $953.73, so that it was not possible to show the source of the fund. The entries were all in the handwriting of Kruse, and plaintiff contends the entries were fictitious and fraudulent. Defendant stresses the fact that the books balanced as indicating that the entries represent a real transaction, but, as a matter of fact, the books were never out of balance, notwithstanding transactions of Kruse now admitted to be fraudulent. Moreover, Kruse was called as defendant's witness, but defendant did not see fit to question him concerning this item or any of these entries. The issue as to whether the entries were fictitious was one of fact. The court

transit account and then send the item to the out-of-town bank for collection. When the item was paid the transit account would be credited and the cash account or some other appropriate account would be debited with the amount received.

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saw and heard the witnesses and decided the issue, we think, correctly.

When the bank closed there was a balance on deposit in the checking account of Kruse amounting to $15.61, and in his savings account $2.28. The account of Carl Zinzer, on account of whose transaction with Kruse defendant was held liable, showed a balance of $17.80 in his savings account and $12.78 in his checking account, a total of $48.47. Defendant contends that it should have been allowed a credit upon its liability to plaintiff for these items.

Zinzer was not a party to the bond, and Both Zinzer and Kruse were legitimately indebted to the bank in other transactions in amounts larger than the total credits due to either one of them. As to Kruse this was so, even if the item of $953.73, heretofore considered, was included. The receiver of the bank, we think, had the right to have these sums applied upon these legitimate indebtednesses rather than in reduction of the amount due by reason of the fraudulent transactions.

The court in its finding for plaintiff included the sum of $2781.16, being interest at 5 per cent upon the principal amount of the various items from the dates upon which these respective items were appropriated by Kruse. Defendant says that interest was not claimed in the declaration, nor in the amended bill of particulars, and points out that interest was not allowed at common law, and that the bond sued on does not contain any promise to pay interest. It contends that under section 2, chapter 74, Illinois State Bar Stats., 1935, defendant was not liable for interest. Moreover, defendant argues that, as the bond provided that defendant should have two months after the claim was presented in which to verify it and make payment, nothing was due under the bond until the expiration of that period. As already said, proof of loss was presented January 9, 1932. Therefore, defendant says, no payment

saw and heard the witnesses and decided the issue, as it did, correctly.

When the bank closed there was a balance on deposit in the checking account of Kruse amounting to $18.71, and in his savings account $2.28. The account of Carl Ainser, on account of whose transaction with Kruse defendant was held liable, showed a balance of $17.80 in his savings account and $18.78 in his checking account, a total of $36.47. Defendant contends that it should have been allowed a credit upon its liability to plaintiff for these items.

Ainser was not a party to the bond, and both Ainser and Kruse were legitimately indebted to the bank in other transactions in amounts larger than the total credit due to either one of them. As to Kruse this was so, even if the item of $[illegible].72, heretofore considered, was included. The receiver of the bank, we think, had the right to have those sums applied upon these legitimate indebtednesses rather than in reduction of the amount due by reason of the fraudulent transactions.

The court in its finding for plaintiff included the sum of $2781.16, being interest at 6 per cent upon the principal amount of the various items from the dates when such these respective items were appropriated by Kruse. Defendant says that interest was not claimed in the declaration, nor in the bill of particulars, and points out that interest was not allowed at common law, and that the bond sued on does not contain any promise to pay interest. It contends that under section 2, chapter 74, Illinois State Bar Stats., 1933, defendant was not liable for interest. Moreover, defendant argues that, as the bond provided that defendant should have two months after the claim was presented in which to verify it and make payment, nothing was due under the bond until the expiration of that period. As already said, proof of loss was presented January 6, 1932. Therefore, defendant says, no payment

was actually due from defendant to plaintiff until March 9, 1932, and it was error to include interest which might have accrued before that time. Defendant cites Ledford v. Hartford Fire Ins. Co., 161 Ill. App. 233; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Cottingham v. National Church Ins. Co., 290 Ill. 26.

It is true that interest was not allowed at common law. The statute in question determines under what circumstances it shall be collectible in the absence of contract. In Meyer v. Johnson, 122 Ill. App. 87, it was held unnecessary to claim it in the bill of particulars, and in Haley v. Supreme Court of Honor, 139 Ill. App. 478, it was held not necessary to claim it in the declaration. To the same effect are McNellis v. Aetna Ins. Co., 176 Ill. App. 575; Waerness v. Independent Order of Foresters, 244 Ill. App. 211.

In Cassady v. Trustees of Schools, 105 Ill. 560, which was an action against the sureties on the bond of the treasurer of a school district, defendants were held liable for interest, the court stating:

"It may be stated as a general proposition, founded upon the general provisions of our statute relating to this subject, and upon the previous decisions of this court, that in all cases where a public officer appropriates and converts to his own use moneys which he holds in his official capacity, and upon proper demand refuses to pay the same over to the party or parties entitled to receive the same, such officer and his sureties will be liable on his official bond for the amount of moneys thus converted and appropriated, with interest thereon ** ."

It is true the bond here did not specifically provide for the payment of interest, but it did expressly bind defendant to pay "such pecuniary loss" as might be sustained by any act of fraud, etc. Section 2 of chapter 74, Ill. State Bar Stats. 1935, provides:

"Creditors shall be allowed to receive at the rate of five per cent per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing.***"

was actually due from [illegible] to [illegible], and it was error to include interest which might have accrued before that time. [illegible] Co., 101 Ill. App. 283; [illegible] 18 Ill. 503; Kuickerbocker [illegible] v. National Surety Co., [illegible] 2.

It is true that it does not [illegible]. The statute in question [illegible] shall be collectible in the absence of contract. [illegible] Johnson, 122 Ill. App. 47, it was held [illegible] the Ill. of particulars, and in [illegible] 139 Ill. App. 472, it was held not necessary to [illegible] it in the declaration. To the same effect are [illegible] 176 Ill. App. 75; [illegible] Ill. App. 711.

In [illegible] v. Trustees of [illegible], [illegible] Ill. 587, which was an action against the trustees on [illegible] of the treasurer of a school district, defendants were held liable for interest, [illegible] stating:

"It may be stated as a general proposition, that [illegible] general provisions of our statute [illegible] and upon the previous decisions of this court, [illegible] public officer [illegible] which he holds in his official [illegible] receive the same, such officer [illegible] his official bond for the amount of [illegible] appropriated, with interest [illegible]."

It is true the [illegible] the payment of interest, but it [illegible] "such pecuniary loss" as [illegible] Section 2 of chapter 74, Ill. [illegible] 1873, provides:

"Creditors shall be allowed to [illegible] per cent per annum for all moneys [illegible] bond, bill, promissory note, or other instrument [illegible]."

The bond must, we think, be construed as one of complete indemnity against pecuniary loss, and when Kruse converted these items, the bank was at that time and thereafter, until reimbursed, deprived of the use of its money. The courts have held that plaintiffs were entitled to recover interest in suits brought upon replevin bonds (Hanson v. Weber Co., 173 Ill. App. 293; Hunter v. Empire State Surety Co., 191 Ill. App. 634) and on a bond given for the performance of a building contract in Sanford Coal Co. v. Wisconsin Bridge & Iron Co., 293 Fed. 735.

This bond was in the nature of an insurance contract which is to be construed liberally in favor of the insured. Gunsul v. American Surety Co., 308 Ill. 312. We hold that so construed, plaintiff is entitled to receive interest at 5% from the respective dates upon which Kruse unlawfully appropriated the funds of the bank to his own use. The items allowed were as a matter of fact converted by Kruse, and it is a familiar rule that the measure of damages for conversion is the value of the thing converted at the time when it is converted, with interest from that date. Under the terms of the bond we think defendant became liable from the dates upon which Kruse wrongfully appropriated the different items.

Defendant complains that the court included in its findings of liability the sum of $1,000 on account of a transaction in connection with the property of one Oszakowski. This transaction occurred on November 21, 1929. On that date Kruse credited $1000 to his checking account at the bank and later checked the same out, and the National Bank of the Republic was debited that amount, indicating a deposit by the Morton Grove bank of a check for that amount drawn by Castle, Williams, Long & Castle on the National Bank of the Republic. Wheeler, the accountant who testified for plaintiff, said that this $1,000 was the money of Oszakowski and not of the bank, and that the bank never paid Oszakowski the

The bond must, we think, be construed as one of complete indemnity against pecuniary loss, and when Kruse converted these items, the bank was at that time and thereafter, until reimbursed, deprived of the use of its money. The courts have held that plaintiffs were entitled to recover interest in suits brought upon fidelity bonds (Hanson v. Weber Co., 173 Ill. App. 293; Hunter v. Empire State Surety Co., 191 Ill. App. 534) and on a bond given for the performance of a building contract in Sanford Coal Co. v. Wisconsin Bridge & Iron Co., 293 Fed. 735.

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amount due him. Defendant therefore contends that the bank sustained no "pecuniary loss" within the meaning of the bond but merely incurred a liability as distinguished from a loss. It relies on the language of the bond, which is: "* *bind ourselves to pay Morton Grove Trust & Savings Bank, Morton Grove, Illinois, as Employer, such pecuniary loss, not exceeding Twenty Thousand ($20,000.00) Dollars, as the latter shall have sustained of money or other personal property (including that for which the Employer is responsible) * *." Defendant cites United States Fidelity & Guaranty Co. v. Maryland Casualty Co., 182 Ill. App. 438, where a distinction is drawn between bonds which contract for indemnity and those which contract against legal liability. Defendant says that this bond must be construed as one of indemnity. The distinction between these two classes of bonds is recognized in Ill. Tunnel Co. v. General Accident Fire & Life Ins. Co., 219 Ill. App. 251; Kinnan v. Globe Indemnity Co., 233 Ill. App. 451, reversed in Kinnan v. Hurst Co., 317 Ill. 251, and the distinction is also recognized by the courts of other states. Kingan & Co. v. Maryland Casualty Co., 65 Ind. App. 301, 115 N. E. 348; London & Lancashire Indemnity Co. v. Cosgriff, 144 Md. 660, 125 Atl. 529; Lowe v. Fidelity & Casualty Co., 170 N. C. 445, 87 S. E. 250. Relying upon these cases, defendant says that without proof that the bank has reimbursed Oszakowski, plaintiff is not entitled to recover for this item.

The contention of defendant does not recognize, we think, the exact nature of the transaction between the bank and Oszakowski. When Kruse credited this item to his own account and then checked it out, he took from the bank that amount of cash for which under the terms of this bond defendant became liable. The net result of the transaction was to deprive the bank wrongfully of the sum of $1000, and this was true, irrespective of whether the

amount due him. Defendant therefore contends that the bank sustained no "pecuniary loss" within the meaning of the bond but merely incurred a liability as distinguished from a loss. It relies on the language of the bond, which is: "* *and ourselves to pay Morton Grove Trust & Savings Bank, Morton Grove, Illinois, as Employer, such pecuniary loss, not exceeding Twenty Thousand ($20,000.00) Dollars, as the latter shall have sustained of money or other personal property (including that for which the Employer is responsible) * *." Defendant cites Pretzel Bakers Liability & Guaranty Co. v. Maryland Casualty Co., 182 Ill. App. 438, where a distinction is drawn between bonds which contract for indemnity and those which contract against legal liability. Defendant says that this bond must be construed as one of indemnity. The distinction between these two classes of bonds is recognized in Ill. Bonding Co. v. General Accident Fire & Life Ins. Co., 219 Ill. App. 281; Hinman v. Globe Indemnity Co., 233 Ill. App. 481, reversed in Hinman v. Hurst Co., 317 Ill. 281, and the distinction is also recognized by the courts of other states. Hinman v. Maryland Casualty Co., 65 Ind. App. 301, 115 N. E. 848; Lodge & Shepard Ins. Co. v. Gosnell, 144 Md. 660, 125 Atl. 829; Howe v. Fidelity & Casualty Co., 170 N. C. 445, 87 S. E. 280. As to the facts in these cases, defendant says that without proof that the bank was reimbursed Oszakowski, plaintiff is not entitled to recover for this item.

The contention of defendant does not recognize, we think, the exact nature of the transaction between the bank and Oszakowski. When Kruse credited this item to his own account and then crossed it out, he took from the bank that amount of cash for which under the terms of this bond defendant became liable. The net result of the transaction was to deprive the bank wrongfully of the sum of $1000, and this was true, irrespective of whether the

bank became liable, which we assume, to remunerate Oszakowski. It will be noticed that the language of the bond includes "that for which the Employer is responsible." The construction for which defendant contends would leave this clause of the bond without meaning. If the matter might be considered as doubtful or ambiguous, the bond must be construed most strongly in favor of plaintiff. Gunsul v. American Surety Co., 308 Ill. 312. In none of the cases cited did the bond contain any such provision as that which we are here required to construe, and the cases are therefore not applicable.

Counsel for defendant has searched the record with great diligence and presented well the alleged errors upon which he relies, but we are not persuaded that there is reversible error in this record, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

bank become liable, which we assume, to reimburse measures. It will be noticed that the language of the bond imposes "liability for which the employer is responsible." The construction for which defendant contends would leave this clause of the bond without meaning. If the matter might be considered as doubtful or ambiguous, the bond must be construed most strongly in favor of plaintiff. Sugarl v. American Surety Co., 30 [illegible] 11, [illegible] none of the cases cited did the bond [illegible] such as which as that which we are here regarding [illegible], the cases are therefore not applicable.

Counsel for defendant has [illegible] the record with great diligence and research well [illegible] on the [illegible] relied, but we are not convinced that [illegible] reversible error in this record, and the judgment is therefore affirmed.

AFFIRMED.

Moorehead, P. J., and O'Connor, J., concur.

38589

FRANK M. McKEY, Administrator with the Will annexed of the estate of RACHEL STERNSTEIN, Deceased,
Appellant,

vs.

(BEN STERNSTEIN), LIBERTY BANK OF CHICAGO, Executor, and IDA STERNSTEIN, Executrix, of the estate of Ben Sternstein, Dedeased,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

284 I.A. 650

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Rachel Sternstein died at Chicago December 4, 1929, at the age of about 80 years; she left a last will and testament in which her sons, Ben and David, were named as executors. After the death of her husband Simon she lived with Ben. Five sons, Ben, David, Morris, Asher and Isadore survived her, and a sixth son died in her native land, Russia. Claims having been made against the executors concerning property of the deceased in their possession, they renounced and McKey was named as administrator with will annexed. The will was admitted to probate in Cook county September 24, 1930. February 11, 1931, the administrator filed a bill for accounting; Ben Sternstein was made defendant thereto. The bill charged various transactions in real estate and money between Rachel and her son Ben during her lifetime, and prayed that Ben might be required to account. He answered neither admitting nor denying the facts charged in the bill but denying the liability to account. The cause was referred to a master who heard the evidence and filed a report finding in substance that $6,000 of the mother's money had been invested by Ben in the premises known as 522-30 Cornelia avenue; that this real estate was sold November 25, 1923, and that Rachel Sternstein was entitled to a half share in the investment and profits which amounted to $13,977.70; that no account for the same had been rendered; also that prior to November 8, 1921, Rachel owned with Ben an undivided one-half interest in

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Appellant,

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Rachel Sternstein died at Chicago December 4, 1920, at the age of about 80 years; she left a last will and testament in which her sons, Ben and David, were named as executors. After the death of her husband Simon she lived with Ben. Five sons, Ben, David, Morris, Asher and Isadore survived her, and a sixth son died in her native land, Russia. Claims having been made against the executors concerning property of the decedent in their possession, they renounced and Coley was named as administrator with will annexed. The will was admitted to probate in Cook County September 24, 1920. February 11, 1921, the administrator filed a bill for accounting; Ben Sternstein was [illegible] thereto. The bill charged various transactions in real estate and money between Rachel and her son Ben during her lifetime, and prayed that Ben might be required to account. He answered denying and denying the facts charged in the bill and denying the liability to account. The cause was referred to a master who heard the evidence and filed a report finding in substance that [illegible] the decedent's money had been invested by him in the premises known as [illegible] Cornelia avenue; that title from Coley was said November 20, 1919, and that Rachel Sternstein was entitled to a [illegible] in the investment and profits which amounted to $13,377.70; that no account for the same had been rendered; the [illegible] prior to [illegible] 8, 1921, Rachel owned with Ben an undivided one-half interest in

the premises known as 1301 South Springfield avenue in Chicago; that Ben managed the property, collected the rents and finally sold the property; that Rachel was entitled to a one-half interest in the proceeds amounting to $11,780.48. October 16, 1931, a decree approving this report of the master was entered, no objections having been filed to the report. The decree directed that Ben Sternstein should account, and the cause was re-referred to the master for the purpose of stating the account.

Pending the re-reference Ben Sternstein died May 6, 1932, and his executor and executrix were substituted as defendants. However, prior to his death Ben Sternstein filed his account as required by rule. He admitted he had received from the sources heretofore mentioned total receipts to the amount of $25,758.18. He credited himself with disbursements to the amount of $37,326.50, showing a net deficit in his own favor of $11,568.32. Complainant filed objections to certain items claimed by way of disbursements. The evidence was taken before the master who reported, stating the account as follows:

"RECEIPTS

Nov. 8 1921	Received from the sale of Springfield property, including original investment	$11,780.48
1923	Received from the sale of Cornelia property, including original investment . . . . . + +	13,977.70
	Total Receipts	$25,758.18

DISBURSEMENTS.

1922	Cash invested in Cornelia property at request of Rachel Sternstein.	6,000.00
1922	to Money sent to Asher Sternstein and his family in Europe.	400.00
1924	At the request of Rachel Sternstein $10,000 was given to Isadore Sternstein for the purpose of purchasing a restaurant	10,000.00
1929	At the time of the death of Rachel Sternstein, all funeral expenses were advanced by Ben Sternstein with the concurrence of the other sons . .	1,600.00
	Total Disbursements . . .	$18,000.00

the premises known as 1601 South Springfield avenue in Chicago; that Don managed the property, collected the rents and finally sold the property; that Hacnel was entitled to a one-half interest in the proceeds amounting to $11,780.48. October 16, 1931, a referee approving this report of the master was entered, no objections having been filed to the report. The decree directed that Sternstein should account, and the cause was re-referred to the master for the purpose of stating the account.

Pending the re-reference Ben Sternstein died May 6, 1932, and his executor and executrix were substituted as defendants. However, prior to his death Ben Sternstein filed his account as required by rule. He admitted he had received from the sources theretofore mentioned total receipts to the amount of $22,[illegible].12. He credited himself with disbursements to the amount of $37,328.30, showing a net deficit in his own favor of $11,858.32. Cohen in not filed objections to certain items claimed by way of disbursements. The evidence was taken before the master who reported, stating the account as follows:

"RECEIPTS

Nov. 8 1931	Received from the sale of Springfield property, including original investment	$11,780.48
1932	Received from the sale of Cottage property, including original investment	12,077.70
	Total receipts	$23,858.18

DISBURSEMENTS.

1922	Cash invested in Cottage property at request of Hacnel at Christmas	$ 6,000.00
1922	To money sent to Asher be Hacnel and his family in Europe.	400.00
1924	At the request of Hacnel at Christmas $1,[illegible] was given to Isadore Sternstein for the purpose of purchasing a restaurant	1,[illegible].00
1929	At the time of the death of Hacnel, Christmas, all funeral expenses were advanced by Isadore Sternstein with the concurrence of the court, one	[illegible].00
	Total Disbursements . . .	$18,000.00

RECAPITULATION

Total Receipts	$25,758.18
Total Disbursements	18,000.00
Balance on hand in the possession of Ben Sternstein at the time of his death	$ 7,758.18."

Objections were filed by both parties and upon the hearing before the chancellor these objections stood as exceptions. On June 17, 1935, a decree in effect overruling all the objections of complainant and sustaining the exceptions of defendant was entered, and the decree found complainant was entitled to credit on account of the Springfield avenue property to the amount of $11,780.48, and on account of the proceeds of the Cornelia avenue property $13,977.70, making a total sum of $25,758.18; that as against this sum defendants were entitled to credits as follows:

"(a) Investment in Cornelia avenue property	$6,000
(b) money sent to Europe to bring to this country the widow of Mandel Sternstein (one of the sons of Rachel) and others	4,000.
(c) marriage gifts of $250 to Anna and Reva Sternstein	500
(d) moneys paid to support Etta Sternstein, widow of Mandel Sternstein, and her children	1,080
(e) moneys sent to Asher Sternstein	400
(f) for support of Rachel Sternstein	5,200
(g) moneys given to Isadore in connection with restaurant	10,000
(h) moneys given to Edward Sternstein upon his confirmation	50
(i) funeral expenses, charities, etc.,	1,000

Defendants' Credits.....	$28,230.00
Complainant's Credits.....	25,758.18
Balance due defendants	$2,471.82."

The decree directed that complainant take nothing; that each of the parties pay half of the costs. From that decree complainant prosecutes this appeal.

Complainant contends that the court erred in its finding as to the items claimed by defendant Ben Sternstein as credits. There is and can be no dispute as to the amount for which Ben Sternstein was required to account, and the errors argued require a consideration only of the evidence as to the various items for

RECAPITULATION

Total Receipts	$25,[illegible]
Total Disbursements	[illegible]
Balance on hand in the possession of Ben Sternstein at the time of his death	$ 7,[illegible]

Objections were filed by both parties and upon the hearing before the chancellor these objections stood as exceptions. On June 17, 1938, a decree in effect overruling all the objections of complainant and sustaining the exceptions of defendant was entered, and the decree found complainant was entitled to credit on account of the Springfield avenue property to the amount of $11,7[illegible], and on account of the proceeds of the Cornelia avenue property $13,277.70, making a total sum of $25,75[illegible]; that as against this sum defendants were entitled to credits as follows:

"(a) Investment in Cornelia avenue property	$[illegible],000
(b) money sent to Harpor to pay to Lila [illegible] widow of Rudel Sternstein (one of the sons of Rudel) and others	$[illegible]
(c) marriage gifts of $250 to Anna and Jeva Sternstein	500
(d) money paid to support Ida Sternstein, widow of Rudel Sternstein, and her children	$[illegible],050
(e) money sent to Harpor [illegible]	400
(f) for support of Rudel Sternstein	[illegible],500
(g) money given to Imatra [illegible] restaurant	$[illegible],000
(h) money given to [illegible]	
confirmation	50
(i) funeral expenses, burial, [illegible]	[illegible]

Defendants' totals . . . . . [illegible]
Complainant's credits . . . . . 25,75[illegible]
Balance . . . . . [illegible]"

The decree directs [illegible] ; that each of the parties pay [illegible] costs. [illegible] complainant prosecutes this appeal.

Complainant contends [illegible] as to the items claimed by [illegible] Ben [illegible] credits. These items can be [illegible] Sternstein was required to account, and the [illegible] require a consideration only of the evidence as to the various items for

which credit was given to defendants. It is conceded by the parties that certain items amounting to $2065 claimed in the verified account filed by Ben Sternstein should be allowed. This leaves only four items which appear in the verified account of Sternstein disputed. These in defendants' account are stated to be:

"1919 and 1920--During a period of a year and a half money was sent to Europe for the purpose of bringing Simon Sternstein's sister and her husband, and the widow of Mandel Sternstein (one of the sons) and their children to America, which payments aggregate $4,000.00

1922 to 1925--During these years $60.00 per month was paid to Etta Sternstein, widow of Mandel Sternstein, for her support and maintenance, one-half of which was paid at the request and on behalf of Rachel Sternstein and the other half being from the personal funds of Ben Sternstein; the total amount chargeable to Rachel Sternstein being 1,080.00

1922 to 1929--During these years Rachel Sternstein lived at the home of Ben Sternstein and all her expenses, including medical services, clothing, charity contributions, etc., were paid by Ben Sternstein, and no contribution was made toward these expenses by Rachel Sternstein from her own money on the understanding that Ben Bernstein was to charge $25.00 per week against the monies held by him, and belonging to Rachel Sternstein, totalling 10,400.00

1924--At the request of Rachel Sternstein $12,000 was given to Isadore Sternstein, one of her sons, for the purpose of purchasing a restaurant, which sum was never repaid . . . . . 12,000.00"

As to all these items complainant argues that the sworn account is upon its face false and unworthy of consideration. As to the item of $4,000, it is pointed out that the name of Rachel Sternstein is not mentioned in connection with it, nor does it state or claim that she authorized the expenditure of the various sums of which the item consists. Moreover, it appears from a tabulation of the receipts as the same appears in the account, that in 1919 and 1920, at the time it is claimed these expenditures were made, Ben Sternstein did not have any money in his hands belonging to Rachel Sternstein, the first receipts belonging to her coming into his hands, as stated in the account, in 1921. It is urged that it is

which credit was given to Sternstein. It is conceded by the parties that certain items amounting to $2003 claimed in the verified account filed by Ben Sternstein should be disallowed. Only seven only four items which appear in the verified account of Sternstein disputed. These in detail as claimed are as follows to wit:

"1919 and 1920--During a period of a year and a half money was sent to Europe for the purpose of aiding Simon Sternstein's sister and her husband, and the widow of Isadel Sternstein (one of the sons) and their children in Europe, which payments amounted $1,000.00

1922 to 1923--During these years $20.00 per month was paid to Etta Sternstein, widow of Isadel Sternstein, for her support and maintenance, one-half of which was paid at the regular rate of $10.00 of Isadel Sternstein and the other half being from the personal funds of Ben Sternstein; the total amount chargeable to Isadel Sternstein being . . . . . $ 120.00

1922 to 1930--During these years Isadel Sternstein lived at the home of Ben Sternstein and all her expenses, including medical services, clothing, charity contributions, etc., were paid by Ben Sternstein, and no contribution was made toward these expenses by Isadel Sternstein from her own money on the understanding that Ben Sternstein was to charge $25.00 per week against the monies held by him, and below, by to Isadel Sternstein, totalling $4,400.00

1924--At the request of Isadel Sternstein $14,000 was given to Isadore Sternstein, [illegible], for the purpose of purchasing a restaurant, which was never repaid . . . . . $14,000.00"

As to all three items [illegible] upon its face false and [illegible] of $4,000, it is point [illegible] mentioned in [illegible] that she authorized the [illegible] item consisted. Moreover, it [illegible] celpts as the [illegible] at the time [illegible] stein [illegible] Sternstein, [illegible] ranks, as stated in the [illegible], in 1921. It is [illegible] that it is

quite impossible that he would expend $4,000 of his mother's money when he, in fact, had none of her money in his possession. Obviously, it is urged, this claim was merely an afterthought on the part of Ben Sternstein. So, also, it is said that the claim of disbursements made after the death of Rachel Sternstein to various charities "with the understanding that they were to be charged against the estate if there should be any money," is quite inconsistent with the assertion that there was no money in the estate at the time of her death but, in fact, a deficit of $11,568.32; further, that according to the sworn statement, total disbursements up to 1924 amounted to $28,480, which, on the face of the statement, amount to $3,000 more than Rachel Sternstein in fact had with defendant at that time. The master recognized these inconsistencies and disallowed certain items for these reasons. The reply of defendant is that the order directing Ben Sternstein to file a verified account was void as contrary to sections 2, 16 and 18 of chapter 2, Smith-Hurd's Ill. Rev. Stats. 1933, which sections were repealed July 1, 1935. See Ill. State Bar Stats. 1935, chap. 2, p. 43. Defendant made no objection to the entry of the order which directed him to account. He filed this statement of account without protest and at no time made any motion for leave to withdraw it or to strike it from the files. Moreover, the statute cited, which was apparently directed to the action of account as it existed at common law rather than in equity, expressly provided that nothing in it should be so construed as to deprive courts of chancery of their jurisdiction in matters of account, and the usual practice in chancery has long been that the party required to account must present his account duly verified. Henderson on Chancery Practice, p. 417; Story v. Brown, 4 Paige (N.Y.) 112. The parties are therefore entitled to have this verified statement of account given that consideration which has usually been awarded to sworn pleadings in courts of

quite impossible that he would expend $4,000 of his mother's money when he, in fact, had none of her money in his possession. Obviously, it is urged, this claim was merely an attribution on the part of Ben Sternstein. So, also, it is said that the claim of disbursements made after the death of Rachel Sternstein to various creditors "with the understanding that they were to be charged against the estate if there should be any money," is quite inconsistent with the assertion that there was no money in the estate at the time of her death but, in fact, a deficit of $11,386.39; further, that according to the sworn statement, total disbursements up to 1924 amounted to $28,485, which, on the face of the statement, amount to $3,000 more than Rachel Sternstein in fact had with defendant at that time. The master recognized these inconsistencies and disallowed certain items for these reasons. The reply of defendant is that the order directing Ben Sternstein to file a verified account was void as contrary to sections 2, 16 and 18 of chapter 3, Smith-Hurd's Ill. Rev. Stats. 1933, which sections were repealed July 1, 1933. See Ill. State Bar Stats. 1935, ch. 2, p. 12. Defendant made no objection to the entry of the order which directed him to account. He filed this statement of his with a motion, and at no time made any motion for leave to withdraw it or to strike it from the files. Moreover, the statute cited, which was apparently directed to the action of account as it existed at common law rather than in equity, expressly provided that nothing in it should be so construed as to deprive courts of chancery of their jurisdiction in matters of account, and the usual practice in chancery has long been that the party required to account must present his account duly verified. See Treatise on Chancery Practice, p. 112; Perry v. Brown, 4 Paige (N.Y.) 115. The parties are concerned to have this verified statement of account given that consideration which has usually been awarded to sworn pleadings in courts of

chancery. The master was justified in giving great consideration to it, and we may not rightly disregard it.

Another undisputed fact appears from the record which tends greatly to discredit the account submitted by defendant; that is, while as to his own business and transactions defendant kept books of account which were carefully audited from time to time, the record does not disclose that any books, records, memoranda or other documentary evidence were produced in support of defendant's statement of account. In Crimp v. First Union Trust & Savings Bank, 352 Ill. 93, our Supreme court said:

"Where there has been a negligent failure to keep trust accounts all presumptions will be against the trustee upon a settlement, obscurities and doubts being resolved adversely to him."

In the next place, it must be remembered that the burden was upon defendant to prove by a preponderance of the evidence that he was entitled to be reimbursed on account of the particular items for which credit was claimed. The duty of an accounting defendant in this respect is well stated in Wootton Land & Fuel Co. v. Owenby, 265 Fed. 91, where the court, after stating that the burden was upon such defendant to show that he had performed his trust and the manner of its performance, continued:

"He owes this duty because of the confidential relation he bears to his principal, and because he is presumed to know how he has performed his duty. *** He must therefore prove any allowances or credits that he may claim to have made on behalf of his principal. In making proof of credits claimed by him, he should present an itemized statement, showing the details of expenditures, with the vouchers, receipts, and memoranda supporting his claim. *** It was formerly the rule that the accounting party, if credible and uncontradicted, could support by his own oath sums not exceeding $20; but even in that case he must show to whom the amount was paid, for what, and when, and the whole amount of such items could not exceed $500. * * * Whatever relaxation from this rule may now be indulged, it is still requisite that the accounting party shall show in detail, and not in round sums, the items expended, and show when, to whom, and for what purpose the payments were made, so that his principal can make a reasonable test of the accuracy of his claim.

It follows as a corollary to these principles that the duty to account is not fulfilled by a mere general statement that the money was expended for the principal's benefit or business, or by a general denial that any of the principal's money was taken

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"Where there has been a negligent failure to keep true accounts all presumptions will be against the trustee upon a settlement, obscurities and doubts being resolved adversely to him."

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It follows as a corollary to the above that [illegible] duty to account is not fulfilled by a mere general statement that the money was expended for the principal's benefit or benefits, or by a general denial that any of the principal's money was taken

for the personal use of the trustee. Such statements are but the conclusions of the witness, and afford no reasonable opportunity to the principal to test the fact or the propriety of the expenditures, and give the court no basis for determining from the facts of each transaction whether the trustee has faithfully performed his duty."

To the same effect are Wasson's Appeal, 85 Pa. Superior Ct. Rep. 560; Crimp v. First Union Trust and Savings Bank, 352 Ill. 93; Fred W. Wolf Co. v. Salem, 33 Ill. App. 614; Moyses v. Rosenbaum, 98 Ill. App. 7; Knights of the Ku Klux Klan v. First National Bank, 254 Ill. App. 264; Corpus Juris, vol. 1, p. 643.

Again, since the chancellor heard no evidence, this court is as free to pass upon the questions of the credibility of the witnesses and of the preponderance of the evidence as was the chancellor. The report of a master, while prima facie correct, has been held to be of an advisory nature only. Mallinger v. Shapiro, 329 Ill. 629; Stasch v. Stasch, 355 Ill. 581; Hahn v. Geiger, 96 Ill. App. 104.

The errors argued require a consideration of each of the items in dispute in the light of the foregoing rules of law. As to the $4,000 item for which defendant claims credit as having been expended in 1919 and 1920, the master found that defendant from his own individual funds, together with his brother David Sternstein's, sent the sum of $1600 to Europe for the purpose of bringing Simon Sternstein's sister and her husband and the widow of Mandel Sternstein and their children to America; that $200 of that amount was subsequently returned to Ben and David Sternstein; that there was no proof that the expenditure of $1400 was requested by Rachel Sternstein, or that these expenditures should be made on her account. Defendant argues that this disbursement was sustained by the testimony of Fannie Herman. The claim is made for $4,000, but the testimony of Fannie Herman is to the effect that only $1400 was sent, not by Ben alone but also by David. While the statement says this sum was expended in 1919 and 1920, it also

for the personal use of the trustee. Such statements are not the conclusions of the witness, and afford no reasonable opportunity to the principal to test the fact or the proper by of the expenditures, and give the court no basis for determining from the facts of each transaction whether the trustee has faithfully performed his duty."

To the same effect are Mason's Appeal, 15 Am. Superior Ct. Rep. 560; Grimm v. First Union Trust and Savings Bank, 382 Ill. 93; Fred W. Wolf Co. v. Salem, 35 Ill. App. 414; Agnew v. Rosenbaum, 98 Ill. App. 7; Ohio Ts of Use in Lieu Elan v. First National Bank, 254 Ill. App. 264; Corpus Juris, vol. 1, p. 942.

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The errors argued require a consideration of each of the items in dispute in the light of the controlling rules of law. As to the $4,000 item for which defendant claims credit as having been expended in 1919 and 1920, the master found that defendant from his own individual funds, together with his brother David Sternstein's, sent the sum of $1500 to Europe for the purpose of bringing Simon Sternstein's sister, her husband and the widow of Manfel Sternstein and their children to America; that $2500 of that amount was subsequently returned to Mr. David Sternstein; that there was no proof that the expenditure of $1500 was required by Rachel Sternstein, or that these expenditures should be made on her account. Defendant argues that this finding was sustained by the testimony of Bennie Herman. The claim is made for $4,000, but the testimony of Bennie Herman is to the effect that only $1500 was sent, not by Ben alone but also by David. While the statement says this sum was expended in 1919 and 1920, it also

appears from it that the first moneys of Rachel Sternstein that came into the hands of Ben Sternstein was on November 8, 1921. The testimony of Fannie Herman is to the effect that she told Rachel Sternstein that she should send money, and that Rachel said to her, "that she is afraid she hasn't got it now, but after her death they can have it."

As already stated, the finding of the master is that no proof was made by defendant that the expenditure of this $1400 was requested by Rachel Sternstein to be made from her funds in the possession of Ben Sternstein, and the master recommended its disallowance. We hold the finding was proper.

The second item, amounting to $1,080 was claimed to have been expended between 1922 and 1925, and said to be half of $60 a month paid to Etta Sternstein, widow of Mandel, on behalf of Rachel. The master found that the testimony of the witnesses produced in support of this item was at variance with the account, and that there was no testimony produced showing that the sum of $30 a month was requested by Rachel Sternstein to be paid from her funds, and for this reason recommended its disallowance. Mandel Sternstein, a son of Rachel, never came to this country but died in Russia. He left him surviving his wife Etta and four daughters. Two of the daughters were brought over some time in 1919, the mother and the other two daughters in the latter part of 1922 or the first part of 1923. Defendant claimed credit in the amount named for the support and maintenance of this family. The account states that $60 a month was paid to Etta and that half of this was paid at the request and on behalf of Rachel Sternstein, the other half being from the personal fund of Ben Bternstein. Ten checks were offered in evidence for the sum of $60 each, which were payable to the order of either Etta Sternstein or A. Sternstein. Israel Lazerowitz, who married Etta Sternstein in Chicago, testified upon the hearing that

appears from it that the first money of Rachel Sternstein came into the hands of Ben Sternstein was on November 8, 1921. The testimony of Annie Herman is to the effect that the girl thought Sternstein had one pound sent money, and that Rachel said to her, "that she is afraid she hasn't got it now, but after [illegible] they can have it."

As already stated, the filing of the [illegible] no proof was made by defendant that the [illegible] of this $100 was requested by Rachel Sternstein to be made from her [illegible] in the possession of Ben Sternstein, and the [illegible] allowance. We hold the finding was proper.

The second item, amounting to $1,[illegible] to have been expended between 1922 and 1923, and said to be [illegible] of $60[illegible] month paid to Etta Sternstein, widow of Rachel, on [illegible] account. The master found that the testimony of the witnesses produced in support of this item was at variance with the [illegible], and that there was no testimony produced showing [illegible] of $60[illegible] month was requested by Rachel Sternstein to be [illegible] for this reason recommended its disallowance. [illegible] a son of Rachel, never came to this country [illegible] in Russia. He left him surviving his wife Etta [illegible] there. Two of the daughters were brought over [illegible] in 1921, the [illegible] other two daughters in the latter part of 1922 or [illegible] of 1923. Defendant claimed credit [illegible] port and maintenance of [illegible] month was paid to Etta [illegible] quest and on behalf of [illegible] the personal fund of Ben Sternstein. [illegible] evidence for the sum of [illegible] of either Etta Sternstein or A. [illegible]. [illegible], who married Etta Sternstein in Chicago, testified [illegible]

Rachel told him during the time he was betrothed to Etta and shortly before they were married, that she had been supporting Etta for several years prior to that time, and that she had instructed her son Ben to give Etta $60 a month to live on. Fannie Fleischner, Fannie Freedman, Ida Julius, Tobay Adler, Nathan Adler, and perhaps one or two other witnesses, gave evidence to a similar effect. Harry Oberman, who was called as a witness during the lifetime of Ben Sternstein and who was a partner of Ben in the clothing business, gave evidence tending to show that this transaction, as a matter of fact, was one between Ben and Dave Sternstein, and that they settled the matter of the expenditure of the money between them on that basis. The master found the evidence insufficient to support the claim. We agree with the finding of the master.

The third disputed disbursement is that of an item of $10,400 for the support of Rachel Sternstein from 1922 to 1929. With reference to this claim the finding of the master is that the witnesses produced in support of the item all testified to statements made by Rachel to the effect that she was paying $50 a month for room and board while residing at the home of Ben Bernstein, and that she at times lamented because she was unable to pay for her room and board; that this testimony is at variance with the account; that no testimony was submitted to the effect that the sum was requested by Rachel Sternstein to be paid from her own funds in the possession of Ben, or that the sum was paid out of her savings. The master was of the opinion that it was highly improbable and unreasonable (without positive proof) that a son as devoted to his mother as was Ben would make a charge for room and board to her, or that he would hold his mother to an accounting for amounts advanced, in accordance with the statement contained in the item. The master had the advantage of seeing and hearing the witnesses, his findings, under all the circumstances, seem reasonable, and the statement of claim is

Rachel told him during the time he was betrothed to Etta and shortly before they were married, that she had been supporting Etta for several years prior to that time, and that she had instructed her son Ben to give Etta $50 a month to live on. Fannie Fleischer, Fannie Freedman, Ida Julius, Toby Adler, Bertha Adler, and perhaps one or two other witnesses, gave evidence to a similar effect. Harry Oberman, who was called as a witness during the lifetime of Ben Sternstein and who was a partner of Ben in the clothing business, gave evidence tending to show that this transaction, as a matter of fact, was one between Ben and Dave Sternstein, and that they settled the matter of the expenditure of the money between them on that basis. The master found the evidence insufficient to support the claim. We agree with the finding of the master.

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inconsistent on its face, and we think it must be held that the testimony produced by defendant did not meet the burden of proof as required in the cases cited.

The fourth item is a claim that at the request of Rachel $12,000 was given to her son Isadore for the purchasing of a restaurant, and that this was never repaid. The finding of the master upon this item was to the effect that on June 16, 1923, Ben Sternstein married Ida Snitovsky; that subsequently thereto Harry Snitovsky, a brother of Ida, came from New York City for the purpose of entering into the restaurant business in Chicago; that Harry desired to purchase a restaurant known as the Philadelphia restaurant and found that he did not have sufficient cash to purchase it and thereupon discussed the matter with Ben and Isadore; that Rachel requested Ben to purchase a one-half interest in the restaurant for her son Isadore and to pay therefor from her funds in Ben's possession $10,000; that this purchase was consummated July 17, 1924; that although the account claims a credit of $12,000, there was no proof submitted that Rachel Sternstein authorized the payment of any sum in excess of $10,000. The master said that while there was conflicting testimony relative to the restaurant transaction, an analysis of the testimony "shows that the weight thereof overwhelmingly preponderates in favor of the defendant"; that the witnesses whose testimony supported defendant's claim were Harry Snitovsky, brother-in-law of Ben Sternstein; Leo Heller, a disinterested witness who had known Ben for about eight years; Mrs. Sue Anderson, a disinterested witness employed as a maid in the home of Ben; Harry Goldstein, also a disinterested witness, distantly related through marriage to Ben; Joseph L. Wasserman, a former insurance broker, now a school teacher, a cousin of Ida Sternstein; Nathan Adler, whose sister is related through marriage to Ida Sternstein; Maurice

inconsistent on its face, and we think it must be held that the testimony produced by defendant did not meet the burden of proof as required in the cases cited.

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Lieberman, a disinterested witness, and sublessee of the store in the building in which the restaurant was located; Ida Julius, a disinterested witness, manager of a cloak shop; Morris Gershuny, a disinterested witness, in the wholesale tobacco business; and Mrs. Bernice Adams, a disinterested witness, the wife of the janitor of the building in which Ben and Rachel Sternstein lived. Evidence contradictory to that of these witnesses was given in favor of complainant by Jacob C. Knee, who testified that Ben Sternstein stated that he lost $20,000 in the restaurant deal; that he signed a guaranty for $2000 for the purpose of carrying on the litigation arising from the sale of the restaurant. The master said this testimony was of no probative value, because, assuming that a statement of this character was made, the witness was either in error in the amount or Ben Sternstein must have said that the loss sustained in the restaurant was in the sum of $20,000; that testimony given by Morris Stein, introduced by complainant, to the effect that Ben stated he wanted to buy the restaurant for his brother-in-law, and that Rachel stated that Ben bought the restaurant for "the boys," meaning Harry Snitovsky and Isadore Sternstein, was susceptible to explanation to the effect that Ben had been instrumental in the negotiations and in the consummation of the purchase of the restaurant, but the master was of the opinion that this testimony was of no probative value in determining whose money was used in the purchase of the restaurant.

The testimony of one Theodore Faklis, a waiter in the restaurant, to the effect that Ben Sternstein stated he put a lot of money in the place, (the master said) could be reconciled by the fact that in speaking to a waiter in a restaurant Ben would not have elaborated upon the fact that the money invested in the business was that of his mother. The master also stated that the testimony of Mrs. Helen O'Brien, secretary to Ben Sternstein and

Liebermann, a disinterested witness, and sublessee of the store in the building in which the restaurant was located; Ida Julius, a disinterested witness, manager of a cloak shop; Morris Gersunny, a disinterested witness, in the wholesale tobacco business; and Mrs. Bernice Adams, a disinterested witness, the wife of the janitor of the building in which Ben and Rachel Sternstein lived. Evidence contradictory to that of these witnesses was given in favor of complainant by Jacob G. Kness, who testified that Ben Sternstein stated that he lost $20,000 in the restaurant deal; that he signed a guaranty for $2000 for the purpose of carrying on the litigation arising from the sale of the restaurant. The master said this testimony was of no probative value, because, assuming that a statement of this character was made, the witness was either in error in the amount or Ben Sternstein must have said that the loss sustained in the restaurant was in the sum of $20,000; that testimony given by Morris Stein, introduced by complainant, to the effect that Ben stated he wanted to buy the restaurant for his brother-in-law, and that Rachel stated that Ben bought the restaurant for "the boys," meaning Harry Sniteveky and Isadore Sternstein, was susceptible to explanation to the effect that Ben had been instrumental in the negotiations and in the consummation of the purchase of the restaurant, but the master was of the opinion that this testimony was of no probative value in determining whose money was used in the purchase of the restaurant.

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the cashier at odd times in the Philadelphia restaurant, had no probative value; that she testified to a conversation she heard between numerous persons that Ben Bternstein and Harry Snitovsky were going to buy a restaurant, and that she understood that it was Ben's money that was to be invested therein. This testimony was disregarded by the master for the same reason.

As already stated, the restaurant business failed and the partners filed a schedule in bankruptcy in which Ben Sternstein, not Rachel, was listed as a creditor. The master thought that this evidence was unimportant and not binding upon Ben Sternstein, as there was no showing that he filed a claim in bankruptcy proceedings or ever knew that he was listed as a creditor; that, moreover, he knew that the liability was one upon which nothing would ever be realized, and it made little difference whether any claim was filed in his own name or that of his mother, since the money had been in fact handled by him.

While under the decisions cited, the findings of a master are merely advisory, a reviewing court is free to give to the findings of the master such weight as these findings may appear, under all the circumstances, to deserve. The evidence in this case consists almost entirely of oral admissions said to have been made concerning transactions which occurred many years prior to the time when the witnesses gave their testimony. Observation of the witnesses as to their apparent candor and their desire to speak the truth, etc., is almost indispensable in any attempt to weigh this evidence. The master had that advantage, which was not enjoyed either by the trial court or by this court. Considerable weight should, therefore, it seems to us, be given to his findings. This item of $10,000 too, in its nature is quite different from the others, in that it seems altogether probable. Isadore was the youngest son; he had not prospered; the mother would naturally

the cashier at odd times in the Philadelphia restaurant, had no probative value; that she testified to a conversation she heard between numerous persons that Ben Sternstein and Harry Sutovsky were going to buy a restaurant, and that she understood that it was Ben's money that was to be invested therein. This testimony was disregarded by the master for the same reason.

As already stated, the restaurant business failed and the partners filed a schedule in bankruptcy in which Ben Sternstein, not Rachel, was listed as a creditor. The master thought that this evidence was unimportant and not binding upon Ben Sternstein, as there was no showing that he filed a claim in bankruptcy proceedings or ever knew that he was listed as a creditor; that, moreover, he knew that the liability was one upon which nothing would ever be realized, and it made little difference whether any claim was filed in his own name or that of his mother, since the money had been in fact handled by him.

While under the decisions cited, the findings of a master are merely advisory, a reviewing court is free to give to the findings of the master such weight as these findings may appear, under all the circumstances, to deserve. The evidence in this case consists almost entirely of oral admissions said to have been made concerning transactions which occurred many years prior to the time when the witnesses gave their testimony. Observation of the witnesses as to their apparent candor and their desire to speak the truth, etc., is almost indispensable in any attempt to weigh this evidence. The master had that advantage, which was not enjoyed either by the trial court or by this court. Considerable weight should, therefore, it seems to us, be given to his findings. This item of $10,000 too, in its nature is quite different from the others, in that it seems altogether probable. Isadore was the youngest son; he had not prospered; the mother would naturally

desire that he be given an opportunity to engage in some business. She would naturally be willing to risk her money with him, while Ben, shrewd in business, would not wish to do so. In view of the predominant number of witnesses, many of whom were disinterested, considering the probability of the testimony they gave, and giving due weight to the exceptional advantages of the master in weighing their testimony, we are inclined to hold that the finding of the master as to this credit should be approved.

Complainant says he is entitled to recover interest from December 4, 1930, on which date demand was made for an accounting, and argues that interest at 5 per cent should be allowed on $17,693.18 from that date. Our finding as to Item 4 precludes such recovery. Complainant cites section 2 of the Interest act (Ill. State Bar Stats. 1935, chap. 74, sec. 2, p. 1939) which provides for the allowance of interest "on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance on money received to the use of another." This account, until now, has not been liquidated, and we hold that complainant is not entitled to interest under the statute. Complainant cites Smyth v. Stoddard, 203 Ill. 424, and Duncan v. Dazey, 318 Ill. 500. In the first case interest was allowed upon the theory that complainant was entitled to recover as in an action in trover for conversion. In Duncan v. Dazey, which was an action in equity, the court said:

> "The rule followed in equity is to allow interest where warranted by equitable considerations. If it does not comport with justice interest may be disallowed. (McKey v. McCoid, 298 Ill. 566.) Both upon equitable principles and by the statute the allowance of interest was proper."

Here, as we have seen, interest is not recoverable under the statute, and, we think, upon equitable principles also, it should be denied.

desire that he be given an opportunity to engage in some business. She would naturally be willing to risk her money with him, while Ben, shrewd in business, would not wish to do so. In view of the predominant number of witnesses, many of whom were disinterested, considering the probability of the testimony they gave, and giving due weight to the exceptional advantages of the master in weighing their testimony, we are inclined to hold that the finding of the master as to this credit should be approved.

Complainant says he is entitled to recover interest from December 4, 1930, on which date demand was made for an accounting, and argues that interest at 5 per cent should be allowed on $17,693.10 from that date. Our finding as to Item 4 precludes such recovery. Complainant cites section 2 of the interest act (III. State Bar Stats. 1935, comp. 74, sec. 2, p. 1886) which provides for the allowance of interest "on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance on money received to the use of another." This account, until now, has not been liquidated, and we hold that complainant is not entitled to interest under the statute. Complainant cites Smith v. Stoddard, 203 Ill. 164, and Duncan v. Dazey, 318 Ill. 330. In the first case interest was allowed upon the theory that complainant was entitled to recover as in an action in trover for conversion. In Duncan v. Dazey, which was an action in equity, the court said:

> "The rule followed in equity is to allow interest at times warranted by equitable considerations. It is not a case not covered with justice interest may be disallowed. (Dazey v. Duncan, 2 Ill. 586.) Both upon equitable principles and by the statute the allowance of interest was proper."

Here, as we have seen, interest is not recoverable under the statute, and, we think, upon equitable principles also, it should be denied.

A proper statement of the account would therefore seem to be:

Total amount received by Ben Sternstein belonging to Rachel Sternstein	$25,758.18
Ben Sternstein should be credited with the following items -	
Cash invested in the Cornelia property at the request of Rachel Sternstein -	6,000.00
Credit of disbursements made as stated in the account, about which no issue was made by complainant before the master -	2,065.00
Amount paid by Ben Sternstein at the request of Rachel Sternstein for interest in the restaurant for Isadore Sternstein -	10,000.00
Disbursements -	$18,065.00
Complainant's credits - $25,758.18 Defendant's credits - 18,065.00	
Balance due complainant	7,693.18

The decree of the Circuit court is therefore reversed and the cause remanded to the Circuit court with directions to enter a decree in conformity with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

A proper statement of the account would therefore seem to be:

Total amount received by Ben Sternstein belonging to Rachel Sternstein	$28,758.18
Ben Sternstein should be credited with the following items -	
Cash invested in the Cornelia property at the request of Rachel Sternstein -	8,000.00
Credit of disbursements made as stated in the account, about which no issue was made by complainant before the master -	2,000.00
Amount paid by Ben Sternstein at the request of Rachel Sternstein for interest in the restaurant for Isadore Sternstein -	10,000.00
Disbursements -	$18,000.00
Complainant's credits - $28,758.18 Defendant's credits - 18,000.00	
Balance due complainant	7,758.18

The decree of the circuit court is therefore reversed and the cause remanded to the circuit court with directions to enter a decree in conformity with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

38609

ADOLPH HERMANN,
Appellant,

v.

MILLS NOVELTY COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

284 I.A. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

June 21, 1935, the trial court sustained the demurrer of defendant to plaintiff's fourth amended declaration, and plaintiff electing to stand by his declaration, his suit was dismissed and judgment entered against him for costs. From this judgment, he has appealed. The question for decision is whether the court erred in sustaining the demurrer; in other words, whether the declaration stated a cause of action.

The declaration was in two counts, and each count contained five paragraphs. The first count, in substance, averred that plaintiff was employed for defendant about fifteen months; that the work which he was employed to do was in connection with a process, in which he was subjected to poisonous and injurious dusts, fumes and gases; that defendant violated section 2 of the Occupational Diseases act (Ill. State Bar Stats., 1935, chap. 48, par. 186, p. 1587), in that it neglected to provide adequate and approved respirators and proper work clothing to be used by its employees, and that as a result of such violation, plaintiff's health became impaired through cyanide poisoning; that prior to beginning suit, plaintiff filed an application for adjustment of his claim with the Illinois Industrial

38509

ADOLPH HERMANN, Appellant,	
v.	
MILLS NOVELTY COMPANY, a corporation, Appellee.	

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

284 I.A. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

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commission, and that on the trial before the commission, defendant made a motion for a finding in its favor on the ground that the commission was without jurisdiction; that March 23, 1932, the Industrial commission found that it was without jurisdiction, for the reason that "the petitioner (plaintiff herein) did not sustain an accidental injury, but was suffering from an occupational disease not covered by the Workmen's Compensation Act;" that this judgment remains in force and effect and is res adjudicata as to the question of jurisdiction, and that by reason thereof, defendant is estopped and barred from questioning the jurisdiction of the Circuit court and from contending that the forum for the trial of the cause is in the Industrial commission.

The second count of the declaration avers the employment of plaintiff by defendant, and asserts that the relation of master and servant was created thereby; that defendant wantonly and wilfully failed to comply with section 2 of the Occupational Diseases act; that while plaintiff was in the exercise of due care for his own safety and as a proximate result of defendant's wilful and wanton carelessness and negligence in failing to provide respirators, etc., his health was injured through cyanide poisoning, by reason whereof he was damaged. The fifth paragraph of the second count makes the same allegations stated in the first count, as to the filing of application for adjustment of the claim with the Industrial commission and its proceedings thereon.

The contention of plaintiff seems to be that the judgment of the Industrial commission to the effect that it was without jurisdiction for the reason that plaintiff had sustained an injury not covered by the Workmen's Compensation act is res adjudicata as between the parties, and that having obtained that judgment before the Industrial commission, defendant is estopped to contend now that

commission, and that on the trial before the commission, defendant made a motion for a finding in its favor on the ground that the commission was without jurisdiction; that March 23, 1932, the Industrial commission found that it was without jurisdiction, for the reason that "the petitioner (plaintiff herein) did not sustain an accidental injury, but was suffering from an occupational disease not covered by the Workmen's Compensation Act;" that this judgment remains in force and effect and is res adjudicata as to the question of jurisdiction, and that by reason thereof, defendant is estopped and barred from questioning the jurisdiction of the circuit court and from contending that the forum for the trial of the cause is in the Industrial commission.

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The contention of plaintiff seems to be that the judgment of the Industrial commission to the effect that it was without jurisdiction for the reason that plaintiff had sustained an injury not covered by the Workmen's Compensation act is res adjudicata as between the parties, and that having obtained that judgment before the Industrial commission, defendant is estopped to contend now that

the Circuit court is without jurisdiction to hear and adjudicate plaintiff's cause of action. Plaintiff cites a number of cases such as Glacken v. Zeller, 52 Barb. 147 (N. Y.); Nolan v. Jackson, 231 Pac. 525; Simmons v. Yoho, 115 S. E. 851; Daigle v. U. S., 42 Court of Claims 124; People v. Prather, 343 Ill. 443; which in substance hold that where a defendant has obtained the dismissal of plaintiff's cause of action in one court upon the theory that the court having the matter under consideration is without jurisdiction because that jurisdiction is vested in another court, such defendant will thereafter be estopped to claim that jurisdiction was exclusively in the court which entered the order of dismissal. The cases cited sustain this general proposition, which is, however, hardly controlling upon this record. The Occupational Diseases act became the law of this state, July 1, 1911 (Laws of Ill., 1911, p. 330). Section 15A of that act provided that for any wilful violation of section 1 a right of action at law might be brought by the party in interest, while section 15B of the same act provided that for failure to comply with section 2, the party in interest should be entitled to compensation in the same manner and subject to the same terms, conditions and limitations as were then or might thereafter be provided by the Workmen's Compensation act for accidental injuries sustained by employees arising out of the course of their employment, and that the disablement of an employee, by reason of an occupational disease arising out of and in the course of his employment, in one or more of the occupations referred to in section 2 of the act, should be treated as the happening of an accidental injury.

Pending this proceeding, the Supreme court of Illinois held that section 1 of the Occupational Diseases act was unconstitutional and invalid. Parks v. Libby-Owens-Ford Glass Co., 360 Ill. 130; Boshuizen v. Thompson & Taylor Co.,360 Ill. 160; Vallat v. Radium Dial Co.,360 Ill. 407; Novarro v. Ill. Steel Co.,360 Ill.483; Kesliok v.

the Circuit court is without jurisdiction to hear and adjudicate plaintiff's cause of action. Plaintiff cites a number of cases such as Gilcoken v. Keller, 52 Barb. 147 (N. Y.); Nolan v. Jackson, 231 Pac. 525; Timmons v. Yoho, 115 S. E. 871; Dodge v. U. S., 42 Court of Claims 124; People v. Prather, 343 Ill. 443; which in substance hold that where a defendant has obtained the dismissal of plaintiff's cause of action in one court upon the theory that the court having the matter under consideration is without jurisdiction because that jurisdiction is vested in another court, such defendant will thereafter be estopped to claim that jurisdiction was exclusively in the court which entered the order of dismissal. The cases cited sustain this general proposition, which is, however, hardly controlling upon this record. The Occupational Diseases act became the law of this state, July 1, 1911 (Laws of Ill., 1911, p. 315). Section 15A of that act provided that for any willful violation of section 1 a right of action at law might be brought by the party in interest, while section 15B of the act provided that for failure to comply with section 2, the party in interest should be entitled to compensation in the same manner and subject to the same terms, conditions and limitations as were then or might thereafter be provided by the workmen's Compensation act for accidental injuries sustained by employees arising out of the course of their employment, and that the disablement of an employee, by reason of an occupational disease arising out of and in the course of his employment, in one or more of the occupations referred to in section 1 of the act, should be treated as the happening of an accidental injury.

Pending this proceeding, the Supreme court of Illinois held that section 1 of the Occupational Diseases act was unconstitutional and invalid. Frame v. Libby-Owens-Ford Glass Co., 360 Ill. 136; Boehmiken v. Thompson & Taylor Co., 360 Ill. 160; Valiet v. Medium Steel Co., 360 Ill. 407; Navarro v. Ill. Steel Co., 360 Ill. 483; Keeling v.

Williams Oil-O-Matic Corp., 360 Ill. 552; Sullivant v. Hillside Fluor Spar Mines, 360 Ill. 607. Section 6 of the Compensation act (Ill. State Bar Stats., chap. 48, par. 206, p. 1591) provides:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury * *."

The contention of defendant appears to be that since section 1 of the Occupational Diseases act has been held unconstitutional and since it has been held by the Industrial commission, to whom the statute has granted exclusive jurisdiction to pass upon claims of this sort arising under section 2, that the claim of plaintiff is not of the kind which entitles him to compensation under that section; and section 6 of the Workmen's Compensation act having abolished any other common law or statutory right to recover damages, the facts as set up in the declaration do not state a cause of action. We think, on the facts as stated, plaintiff is not precluded by section 6 of the Workmen's Compensation act, for the reason that section 6 abolishes the right of a claimant to recover under the common law or statute only as to "any employee who is covered by the provisions of this act." Since section 1 has been held unconstitutional and the Industrial commission has decided that it is without jurisdiction under section 2 to grant compensation for the injury set up in the declaration it appears that plaintiff is not covered by the provisions of the Occupational Diseases act and that he is not thereby precluded from a recovery, either under the common law or any other statutory right. If we assume the existence of such other common law or statutory right, the Circuit court by reason of article 6, section 12 of the Constitution of 1870 would have original jurisdiction of any such cause, and under the doctrine of estoppel, defendant having secured adjudication that

Williams Oil-O-Matic Corp., 360 Ill. 552; Sullivant v. Millside Flour Spar Mines, 360 Ill. 607. Section 6 of the Compensation act (Ill. State Bar State., chap. 48, par. 206, p. 1951) provides:

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The contention of defendant appears to be that since section 1 of the Occupational Diseases act has been held unconstitutional and since it has been held by the Industrial commission, to whom the statute has granted exclusive jurisdiction to pass upon claims of this sort arising under section 2, that the claim of plaintiff is not of the kind which entitles him to compensation under that section; and section 6 of the Workmen's Compensation act having abolished any other common law or statutory right to recover damages, the facts as set up in the declaration do not state a cause of action. We think, on the facts as stated, plaintiff is not precluded by section 6 of the Workmen's Compensation act, for the reason that section 6 abolishes the right of a claimant to recover under the common law or statute only as to "any employee who is covered by the provisions of this act." Since section 1 has been held unconstitutional and the Industrial commission has decided that it is without jurisdiction under section 2 to grant compensation for the injury set up in the declaration it appears that plaintiff is not covered by the provisions of the Occupational Diseases act and that he is not thereby precluded from a recovery, either under the common law or any other statutory right. If we assume the existence of such other common law or statutory right, the Circuit court by reason of article 6, section 12 of the Constitution of 1870 would have original jurisdiction of any such cause, and under the doctrine of estoppel, defendant having secured adjudication that

the Industrial commission was without jurisdiction would be estopped by that action from denying jurisdiction in the Circuit court. However, this conclusion rests upon the assumption that either at common law or under some other statute, a right of action exists in favor of the plaintiff. Plaintiff does not suggest any other statute under which he might recover, and this court in Sylvester v. Buda Co., 281 Ill. App. 139, following the dicta of the Supreme court, as well as precedents in other states, has held that no right of action exists at common law in favor of an employee who contracts an occupational disease in the course of his employment. That conclusion was compelled by numerous opinions of the Supreme court which are cited. If that reasoning was correct, the declaration of plaintiff does not state a cause of action. The circuit court has no jurisdiction of the subject matter, and there is therefore no basis for an estoppel. Malina v. Oplatka, 304 Ill. 381; Will v. Voliva, 344 Ill. 510; Hawkins v. Hawkins, 350 Ill. 227; Village of Glencoe v. Industrial Comm., 354 Ill. 190; Reif v. Barrett, 355 Ill. 104; People v. Women's Athletic Club, 360 Ill. 577; Tierney v. Helvetia Swiss Fire Ins. Co., 126 App. Div. 446, 110 N. Y. S. 613; Royal Sales Co. v. Gaynor, 164 Fed. 207; Parker v. Travelers Ins. Co., 174 Ga. 525, 163 S. E. 159; 15 C. J. 809, 810.

It follows, of course, that the decision of the Industrial board that it was without jurisdiction to consider plaintiff's claim section 2 is res adjudicata. Rubin v. Kohn, 344 Ill. 162; Harding Co. v. Harding, 352 Ill. 417; Fico v. Industrial Comm., 353 Ill. 74; Lewin Metals Corp. v. Industrial Comm., 360 Ill. 371. However, if that decision of the Industrial Board was erroneous, plaintiff had his remedy by way of review in the Supreme court. Apparently, he did not desire to avail himself of that right. It is perhaps needless to add that by appealing to this court, plaintiff has waived undecided constitutional questions.

For the reasons indicated, the judgment of the trial court is affirmed. AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

the Industrial commission was without jurisdiction would be stopped by that action from denying jurisdiction in the Circuit court. However, this conclusion rests upon the assumption that either at common law or under some other statute, a right of action exists in favor of the plaintiff. Plaintiff does not suggest any other statute under which he might recover, and this court in Sylvester v. Knox Co., 281 Ill. pp. 132, following the dicta of the Supreme court, as well as precedents in other states, has held that no right of action exists at common law in favor of an employee who contracts an occupational disease in the course of his employment. That conclusion was compelled by numerous opinions of the Supreme court which are cited. If that ruling was correct, the declaration of plaintiff does not state a cause of action. The circuit court has no jurisdiction of the subject matter, and there is therefore no basis for an estoppel. Hatting v. Phelps, 304 Ill. 381; Will v. Valley, 344 Ill. 210; Hawkins v. Hawkins, 330 Ill. 277; Village of Tiaroco v. Industrial Comm., 334 Ill. 120; Heit v. Barrett, 355 Ill. 124; People v. Women's Athletic Club, 360 Ill. 377; Tierney v. Helvetia Swiss Wine Inc. Co., 186 App. Div. 440, 110 N. Y. S. 812; Royal Sales Co. v. Dymont, 164 Md. 207; Parker v. Travelers Ins. Co., 174 Ga. 325, 163 S. E. 109; 18 R. C. L. 320, 810.

It follows, of course, that the decision of the Industrial board that it was without jurisdiction to consider plaintiff's claim section 3 is res adjudicata. Lubin v. Cohn, 344 Ill. 108; Hunting Co. v. Harding, 338 Ill. 417; Kiko v. Industrial Comm., 333 Ill. 74; Lewin Metals Corp. v. Industrial Comm., 300 Ill. 371. However, if that decision of the Industrial board was erroneous, plaintiff had his remedy by way of review in the Supreme court. Apparently, he did not desire to avail himself of that right. It is perhaps needless to add that by appealing to this court, plaintiff has waived undecided constitutional questions.

For the reasons indicated, the judgment of the trial court is affirmed.

Judgment affirmed.

McGuire, P. J., and O'Connor, J., concur.

38349

JOHN HOFF,
Appellee,

vs.

ALRICK LINDSTROM and YELLOW CAB COMPANY, a Corporation,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

57

284 I.A. 651

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a judgment for $32,000 entered against them on the verdict of a jury in a personal injury case.

May 15, 1934, plaintiff brought an action against Alrick Lindstrom to recover damages for personal injuries claimed to have been sustained through the negligence of Lindstrom in driving a Yellow cab which struck and severely injured plaintiff. Lindstrom filed his answer, denying liability. June 25th the Yellow Cab company, a corporation, was made an additional party defendant, and on the same day plaintiff filed an amended complaint. July 2nd both defendants filed their joint answer, denying liability. Afterward, on motion of plaintiff, an order was entered advancing the cause for trial and it was set for hearing on January 21, 1935. January 29, 1935, another order was entered setting the case for trial on the following day. and January 29th defendants filed an amendment to their joint answer, setting up that all parties were subject to the provisions of the Workmen's Compensation act and therefore plaintiff's suit would not lie. The next day plaintiff filed a reply to the amendment, the substance of which was that plaintiff was employed as a chauffeur by the Kremko company, a corporation, which was subject to the Workmen's Compensation act, but averred that the injuries for which plaintiff sued did not arise out of and in the course of his employment and therefore the Compensation act did not apply.

The record discloses that plaintiff, who was 41 years old, lived at 1419 South 58th avenue, in Cicero; he had been a chauffeur

35340

NEW YORK,

Appellee,

vs.

UNION LIGHTERAGE and YELLOW CAB COMPANY, a Corporation,
Appellants.

[illegible]

[illegible]

254 I.A. 651

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal defendants seek to reverse a judgment for $20,000 entered against them on the verdict of a jury in a wrongful injury case.

[illegible] 1931, [illegible] Lighterage Company [illegible] Lighterage to receive damages for [illegible] injuries received by [illegible] been operated through the negligence of defendants in driving a Yellow cab which struck and [illegible] injured plaintiff. Defendants filed his answer, denying liability. [illegible] pany, a corporation, was made [illegible] the same day plaintiff filed [illegible] defendants filed their joint answer, denying liability. Afterwards, on motion of plaintiff, [illegible] trial and it was set for [illegible] 1932, another order was [illegible] the following day. [illegible] to their joint answer, [illegible] the provisions of the Workmen's Compensation [illegible] title's suit would not lie. [illegible] the answer, the [illegible] as a counsel by the Lerdo company, a corporation, [illegible] to the Workmen's Compensation [illegible] which plaintiff used at her [illegible] employment and therefore [illegible].

The record discloses [illegible] lived at 1419 Sheridan [illegible] in Jersey [illegible]

for many years and had been employed driving a truck for the Kremko company, a corporation, for about six years; that the Kremko company was located at 4830 South Turner avenue, Chicago, and engaged in the manufacture of chocolate and syrup. For some time prior to the accident, which happened a few minutes after nine o'clock on the morning of October 2, 1933, plaintiff, because of the depression, did not work regular hours nor every day. On the afternoon of Friday, September 29th, plaintiff, who had been working that day at the Kremko plant, was told by his superior to take the truck he had been driving to the Reo company's repair shop at 25th street and Indiana avenue, for repairs, and when plaintiff delivered the truck to the Reo company to ascertain at what time the following Monday he could get the truck, and for plaintiff to go at such time and get the truck; "I should pick it up and come to the plant with it;" that there would be no work on Saturday for plaintiff. Plaintiff took the truck to the Reo shop as directed and there ascertained the repairs would be made and he could get the truck about 9:30 o'clock Monday morning. Plaintiff then went to his home and Monday morning took an eastbound street car on 12th street at 58th avenue, Cicero, to go to the Reo shop for the truck. He came east on the street car to State street, Chicago, transferred there to a southbound State street car and got off on the north side of 25th street, the street car having stopped for that purpose; he stepped from the front exit of the car, walked east in front of it to go to the Reo shop, two blocks east of State street, and as he passed the front end of the street car he was struck by a Yellow cab driven south by Lindstrom in State street in the northbound street car track, and severely and permanently injured.

Streets are numbered in Chicago commencing at State and Madison streets in the Loop; there are 800 numbers to a mile east

[illegible] years he had been employed driving [illegible] for the Franco company, a corporation, [illegible] years; [illegible] the Franco company was located at [illegible] street, [illegible] and engaged in the [illegible] business. On June [illegible] the point to the accident, which happened a few minutes after nine o'clock on the morning of October 7, 1921, [illegible] of the operation, [illegible] the afternoon of Friday, [illegible] working that day at the Franco plant, was [illegible] to take the truck he was driving to [illegible] shop at 55th street and Indiana avenue. [illegible] plaintiff delivered the truck to [illegible] next time the following morning [illegible] plaintiff to go at [illegible] up and down in the street with it; [illegible] Saturday for practice. [illegible] shop as directed and [illegible] and he could [illegible] plaintiff then went [illegible] bound street car on [illegible] the Leo shop for [illegible] Drake street, Chicago. [illegible] street car and [illegible] street car driving [illegible] front exit of the car, [illegible] Leo shop, the [illegible] front and [illegible] south by [illegible] street, and [illegible] street, and [illegible].

[illegible] in [illegible] Indiana avenue is the alley; there are [illegible] [illegible]

and west, and north and south, from that point, from which it appears that plaintiff lived more than seven miles west of State street. The Kremko plant where he worked was about 4½ miles south of 12th street. Plaintiff usually took the 12th street car to go to work at the Kremko plant located 3300 west, transferring at Kedzie avenue, 3200 west.

Defendants do not contend they were not guilty in driving the taxicab on the wrong side of the southbound State street car at the time plaintiff was struck and injured. Nor do they, in this court, contend that plaintiff was guilty of contributory negligence. The sole question for consideration, so far as defendant Yellow Cab company is concerned, was whether plaintiff's injuries arose out of and in the course of his employment.

Counsel for plaintiff contend this was a question of fact for the jury, while on the other side counsel for the Cab company say the question was one of law, and that the trial court should have directed a verdict in its favor, as requested.

In Fairbank Co. v. Industrial Commission, 285 Ill. 11, the court said (p. 13): "The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment or incidental to it. When work for the day has ended and the employee has left the premises of his employer to go to his home the liability of the employer ceases, unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment. *** (p. 14). There may be circumstances under which an employee in going to and returning from the place of his employment would be held to be in the line of his employment, but those cases would be governed and controlled by their own particular circumstances."

In Dambold v. Industrial Commission, 323 Ill. 377, the

and west, and north and south, from fixed points, thus make it appear that plaintiff lived more than seven miles west of Main street. The Bremen plant worker [illegible] was about 1 mile south of 12th street. Plaintiff usually took [illegible] to work at the Arcade plant located [illegible] street, intersecting Adams avenue, 3200 west.

Defendants do not contend that [illegible] the taxicab on the wrong side of the [illegible] street nor at the time plaintiff was struck [illegible]. In [illegible], in this court, contend that plaintiff [illegible] negligence. The sole question for consideration [illegible] federal Yellow Cab Company is concerned, was [illegible] injuries arose out of and in the course of his employment.

Counsel for [illegible] the question of fact for the jury, relied on the [illegible] for the jury may say the question was one of law, and the trial court should have directed a verdict in its favor, as a matter.

In Gilchrist Co. v. Industrial Commission, [illegible] ill. [illegible], the court said (p. 14): "The employer is liable [illegible] only for an injury arising out of the employee's [illegible] act for the employer [illegible] or [illegible] in it. When [illegible] the premises of his employer [illegible] the employer or not, while after [illegible] the employer is [illegible] under his control or supervision. [illegible] circumstances under which an employee is [illegible] the place of his employment [illegible] his employment, [illegible] by their own particular circumstances."

In Kimbold v. Industrial Commission, [illegible] ill. 577, [illegible]

court said (p. 379): "A workman is said to be in the course of his employment when he, within the time covered by such employment, is doing something he might reasonably do while so employed, at a place where he might be while in that employment. The test relates to time, conduct and place. The words 'arising out of' indicates a causal relation. (Dietzen Co. v. Industrial Board, 279 Ill. 11.) There may be circumstances under which an employee, in going to and returning from his place of employment, could be held to be in the line of his employment, but such cases are governed and controlled by their own particular facts and circumstances. (Fairbank Co. v. Industrial Com., 285 Ill. 11.)"

In Scully v. Industrial Com., 284 Ill. 567, DeVito was employed as laborer by Scully and claimed compensation for injuries sustained. He usually took a street car on his way to and from his work. On the morning of the injury he was waiting for a street car to go to his work when Scully came along in an automobile and directed him to get on the truck and go with him to a pipe yard to get some pipe, and while on their way plaintiff was injured. The court said (p. 570): "DeVito was injured in the course of his employment and his injuries arose out of the employment. He was acting under the specific directions of his employer when he started to his working place to pick up the left-over material, and he and his employer were then engaged at a branch of the work necessary and incident to the main business or occupation in which he was employed, - the gathering up and carrying material necessary to be used in such business or occupation. The danger to which he was subjected arose by reason of his obedience to the directions of his employer and while engaged in an act or work which was a necessary incident of the main business of his employer. It does not matter that he had not yet arrived at the place where the excavating was to be done. An injury may occur within the course

court said (p. 577): "A workman is said to be in the course of his employment when he, within the time covered by the employment, is doing something he might reasonably do while so employed, at a place where he might be while in that employment. The term relates to time, conduct and place. The words 'arising out of' indicates a causal relation. (*Clifton [illegible]*, 279 Ill. 11.) There may be circumstances under which an employee, in going to and returning from his place of work, [illegible], could be held to be in the line of his employment, but such cases are governed and controlled by their own particular facts and circumstances. (*Fairbanks Co. v. Industrial Com.*, 285 Ill. 11.)"

In *Scully v. Industrial Com.*, 284 Ill. 567, Scully was employed as laborer by [illegible] and claimed compensation for injuries sustained. He usually took a street car on his way to and from his work. On the morning of the injury he was waiting for a street car to go to his work when [illegible], came along in an automobile and directed him to get in the truck and go with him to a place near to get some pipe, and while on their way Scully was injured. The court said (p. 570): "Scully was injured in the course of his employment and his injuries arose out of his employment. He was acting under the specific directions of his employer and had started to his working place in pursuance of the directions, and he and his employer were then engaged in a work which was necessary and incident to the main business or corporation in which he was employed, - the procuring and carrying the pipe necessary to be used in such business or corporation. The danger to which he was subjected arose by reason of his obedience to the directions of his employer and while engaged in doing the work which was a necessary incident of the main business of his employer. It does not matter that he had not yet arrived at the place where the excavating was to be done. An injury may occur within the course

of the employment and arise out of it even though it happen while the employee is on his way to or from his usual place of employment or while engaged in the doing of an act that is necessary to or an incident of the employment." Citing other cases decided by our Supreme court.

Plaintiff contends that he was injured on his way to work; that his day's work did not begin until he arrived at the Reo repair shop, 25th street and Indiana avenue, because the evidence shows that on Friday afternoon when his superior told him to take the truck away for repairs, he also told plaintiff to telephone his superior at the Kremko plant when he arrived at the Reo shop and get the truck, and his pay, which was 63 cents an hour, would start from that time.

In Mueller vs. Industrial Board, 283 Ill. 148, where a workman was injured at about 7:30 o'clock in the morning, although his day's work, for which he was to be paid, did not commence until 8 o'clock, and he had gone across the street to telephone on his employer's business, it was held that he was entitled to compensation for injuries sustained while in the act of telephoning. The court there said (p. 154): "Too great stress cannot be placed on the exact time when the earning of wages commenced and ended." While the question whether a person who is injured is receiving pay at the time of his injuries is an element to be taken into consideration, yet we think it is not of controlling importance here. The controlling question is, Was plaintiff, at the time he was injured, "performing some act for the employer in the course of his employment or incidental to it?" If reasonable minds might draw different conclusions from the evidence, the question should be submitted to the jury, although there be no conflict in the evidence. St. L. Stock Yards vs. Wiggins Ferry Co.,

of the employment and arise out of it even though it occurs while the employee is on his way to or from his usual place of employment or while engaged in the doing of [illegible] incidentally to or an incident of the employment." [illegible] other cases decided by our Supreme Court.

Plaintiff contends that he was injured on his way to work; that his day's work did not begin until he arrived at the bus repair shop. [illegible] and the evidence shows that on Friday afternoon when his superior [illegible] to take the truck away for repairs, he [illegible] plaintiff [illegible] see his superior at the garage plant when he arrived [illegible] and got the truck, and his pay, which was 45 cents an hour, would start from that time.

In Sackett vs. Industrial Board, [illegible], where a workman was injured at about 7:30 o'clock [illegible], although his day's work [illegible] until 8 o'clock, and he [illegible] on his employer's premises, in passing upon the question of compensation for injuries sustained while he was not in the discharge [illegible], the court there said: '[illegible] cannot be placed on any exact [illegible] must commence or cease.' While the [illegible] injured in receiving pay at [illegible] to be taken into consideration, yet [illegible] controlling importance here. [illegible] the plaintiff, at the time he was injured, 'was doing something [illegible] employer in the course of his employment at [illegible].' If reasonable minds might draw different conclusions [illegible], the question would be submitted [illegible] there being no conflict in the evidence. St. L. Stock Yards vs. Wiggins Ferry Co.,

102 Ill. 514; Weeks vs. C. C. & N. W. Ry. Co., 198 Ill. 551; Manthei vs. Belt Ry. Co., 232 Ill. 568, and Berkowitz vs. Terminal R.R.Co., 234 Ill. 450.

But we are of opinion the evidence shows (and no reasonable inference can be drawn to the contrary) that at the time he was injured plaintiff was performing an act for his employer, namely, going to get the truck. In these circumstances the court should have directed a verdict in favor of the Yellow Cab Co., as requested.

The question as to defendant Lindstrom's liability is entirely different. He was not immune from an action for personal injuries in the instant case. The Workmen's Compensation act is not applicable. Botthof vs. Fenskey, 280 Ill. App. 362. In that case it was held by another Division of this court that the Workmen's Compensation act did not abrogate the right of an employee to maintain an action for damages for negligence against a fellow employee of the same employer. Obviously Lindstrom, who was employed by the Yellow Cab Co. at the time in question, was not liable to pay plaintiff compensation under the Workmen's Compensation act.

The Botthof case goes very thoroughly into the question now before us and we are entirely satisfied with what the court there said.

But counsel for defendants say that the question whether Lindstrom came within the Workmen's Compensation act cannot be urged here because the case was tried upon the theory, as shown by the admission of counsel and the pleadings, that the Compensation act applied to both defendants if plaintiff's injuries arose out of and in the course of his employment. And counsel say plaintiff cannot shift his position in this court and now contend that the Workmen's Compensation act did not apply to Lindstrom. There is some merit in this contention, but an examination of the record

102 III. 314; [illegible] va. Bolt Co., [illegible] 334 III. 434.

But we are at liberty to analyze [illegible] interference can be drawn to the contrary) [illegible] injured plaintiff was [illegible] going to get the truck. In some circumstances [illegible] have directed a verdict in favor of the defendant [illegible], at least [illegible].

The question of to defendant [illegible] strictly different. He was not [illegible] injuries in the [illegible] case. The [illegible] not applicable. [illegible] va. [illegible], [illegible] 111. [illegible] that case it was held by [illegible] Workmen's Compensation Act [illegible] to maintain an action [illegible] employee of the same employer. [illegible] ployed by the [illegible] liable to any plaintiff [illegible] tion act.

The right of [illegible] before we [illegible] said.

[illegible] litigation came [illegible] urged here [illegible] the adoption of [illegible] act applied to [illegible] and in the course of [illegible] cannot shift the [illegible] Workmen's Compensation [illegible] some merit in this [illegible]

discloses that when counsel for both parties were discussing suggestions for instructions under the Practice act which went into force January 1, 1934, and before it was subsequently amended, the question of whether the Act applied to Lindstrom was considered. At that time the court said: "I don't think there is an issue in this case from the pleadings as to whether or not both employers were under the Act. *** I think it is admitted both employers were under the Act." Counsel for defendants: "We may not be able to admit it. In other words, I don't think people who are not under the Act can admit themselves under the Act." And later on counsel for defendants said: "Lindstrom may be liable regardless of the provisions of the Compensation act. I am not sure. Of course, if he were injured by an accident arising out of the course of employment, Lindstrom could not be held to pay compensation. Only the employer could be held to pay compensation." To which counsel for plaintiff replied: "We had the same thing up the other day, and in your amendment to your answer you specifically allege that Lindstrom and the Yellow Cab were under the Act." Counsel for defendants: "Lindstrom can't be held to pay under the Workmen's Compensation Act. The only way that Lindstrom could be held responsible to this plaintiff, would be by an action in damages. Lindstrom is not responsible for compensation under the provisions of the Act." Counsel for plaintiff: "I raised the same point the other day." The Court: "I can give them forms of verdicts that they can find one defendant guilty and the other not, or find both defendants guilty." Counsel for plaintiff: "You allege that the Yellow Cab and Lindstrom both averred they were working under the Compensation Act?" Counsel for defendants: "That is true, but if the plaintiff came before the Industrial Board and sought to recover compensation against the driver, he could not get it. ***" The Court: "Must there be only

disclosed that when counsel for both parties were discussing conditions for instructions under the provided not until after June force January 1, 1944, and before it was submitted, counsel, the question of whether the act applied to Lindstrom was considered. At that time the court said: "I don't think there is an issue in this case from the pleadings as to whether or not said employers were under the Act. ... I think it is admitted by the employers were under the Act." Counsel for defendants: "We may not be able to admit it. In other words, I don't think people who are not under the Act can admit themselves under the Act." And later on counsel for defendants said: "Lindstrom may be liable in the provisions of the Compensation Act. I am not sure. Of course, if he were injured by an accident arising out of the course of employment, Lindstrom could not be held to pay compensation. Only the employer would be held to pay compensation." [illegible] counsel for plaintiff replied: "We have [illegible] by [illegible], and in your amendment to your answer you [illegible] Lindstrom that Lindstrom and the Yellow Cab were under the Act." [illegible] for defendants: "Lindstrom can't be held to pay under the Workmen's Compensation Act. The only way that Lindstrom could be held responsible in this claim tit, would be by an action in tort. Lindstrom is not responsible for compensation under the provisions of the Act." [illegible] for plaintiff: "I raised the same point [illegible]." [illegible] said: "I can give them terms or verdicts [illegible] and find the defendant guilty and the other not, or find [illegible] guilty." Counsel for plaintiff: "You stipulate that the [illegible] a to agreed they were acting under the [illegible]?" Counsel for defendants: "That is true, but if [illegible] Industrial Board and sought to recover [illegible] the driver, he could not get it. ..." [illegible] said: "Much [illegible]

three forms?" (of verdict) submitted to the jury.

From the foregoing it is clear that counsel for defendants on the trial took the position that the Compensation act did not apply to Lindstrom, while counsel for plaintiff apparently there took the opposite view. And from what we have above quoted it is clear the trial court submitted proper forms of verdict to the jury. But in any event, the question whether Lindstrom in the instant case came within the purview of the Workmen's Compensation act is before us. And, as above stated, we are clearly of opinion that under the rule announced in the Botthof case, the Compensation act had no application to Lindstrom, and the judgment against him must be affirmed.

The judgment of the Superior court of Cook county as to the Yellow Cab Co. is reversed and it is affirmed against the defendant Lindstrom. Minnis vs. Friend, 360 Ill. 328; Adkins vs. Strathmore Co., 278 Ill. App. 183.

JUDGMENT REVERSED AS TO YELLOW CAB CO.

JUDGMENT AFFIRMED AS TO LINDSTROM.

McSurely, P. J., concurs.

Matchett, J., dissenting in part: I think the judgment as to both defendants should be affirmed.

three forms?" (of verdict) submitted to the jury.

From our foregoing it is clear that counsel for defendants on the trial took the position that the presumption in, did not apply to Lindstrom, which counsel for plaintiff vigorously urge the opposite view. And from that it [illegible] is clear the trial court committed error [illegible] to the jury. But in any event, the [illegible] instant case [illegible] act is before us. And, as [illegible] that under the rule announced in the [illegible] act but no application to Lindstrom, and [illegible] must be affirmed.

The judgment of the Superior Court of [illegible] Yellow Cab Co. is reversed and it is [illegible] Lindstrom. Minnis vs. Friend, [illegible] Co., 274 Ill. App. 1[illegible].

[illegible]

[illegible]

Accordingly, R. J., concurs.

Gatchett, J., dissenting as [illegible]

38587

GEORGE A. GILES,
Appellant,

vs.

GRADY & NEARY INK COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 651

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order of the Municipal court of Chicago, allowing defendant's motion to vacate a judgment entered by default in plaintiff's favor and against defendant, and for leave to defend the case on its merits.

The record discloses that on May 14, 1935, plaintiff filed suit in the Municipal court. In his statement of claim he alleged that there was due him from defendant "wages and commissions for services rendered by plaintiff to the defendant as a salesman," and that after allowing all just credits and set-offs there is a balance due plaintiff of $86.75. The statement of claim further alleged that plaintiff was "entitled to attorney's fees in the sum of $25.00 or such sum as it may appear just and reasonable to the court." Summons was issued returnable at 9:30 o'clock on the morning of May 27, 1935, and the return of the bailiff shows that he served the defendant corporation by leaving a copy of the summons, "together with a copy of the papers attached *** with Mrs. Clara Grady an Agent of said defendant found in the City of Chicago." On the return date of the summons defendant was defaulted for want of appearance and judgment was entered on plaintiff's statement of claim for $111.75. June 29, 1935, after a lapse of more than 30 days from the time the judgment was entered, an execution was issued and demand made on defendant, and July 12th an order was entered on defendant's motion to vacate the default and judgment, which motion was continued to July 15th, on which date defendant

38887

OSCAR A. OLSON,
Appellant,

vs.

GRADY & HEALY TIE COMPANY, Inc.,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

284 I.A. 631

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order of the Municipal court of Chicago, allowing defendant's motion to vacate a judgment entered by default in plaintiff's favor against defendant, and for leave to defend the case on its merits.

The record discloses that on May 14, 1935, plaintiff filed suit in the Municipal court. In his statement of claim he alleged that there was due him from defendant "wages and commissions for services rendered by plaintiff to the defendant as a salesman," and that after allowing all just credits [illegible] there is a balance due plaintiff of [illegible].75. The statement of claim further alleged that plaintiff was "entitled to attorney's fees in the sum of $25.00 or such sum as [illegible] reasonable to the court." Summons was issued [illegible] in the morning of May 27, 1935, [illegible] that he served [illegible] the summons, "together with [illegible] Mr. Clark Grady an agent of said [illegible]." On the return day of the [illegible] for want of appearance and [illegible] of claim for [illegible] days [illegible] filed its [illegible] entered on [illegible] which motion was continued to July 1935, [illegible]

filed a petition in support of its motion. The matter was continued from time to time, and there appears in the record what purports to be a verified demand for wages made by plaintiff on defendant July 23, 1935. July 31st defendant filed an amendment to its petition and plaintiff filed written motions to strike defendant's petition and the amendment. On the same day defendant's motion was allowed and plaintiff appeals.

Under the new practice, plaintiff's motion to strike the petition and the amendment to it is equivalent to the old demurrer, and the court in allowing defendant's motion to open up the judgment and for leave to defend, in effect overruled plaintiff's motion to strike. In these circumstances, defendant's contention that the question of the sufficiency of the petition and the amendment was not properly saved, is clearly erroneous. Defendant's petition was based on the provisions of Sec. 21 of the Municipal Court act, and one of the methods for testing the sufficiency of such petition is by demurrer. People v. Gardner, 279 Ill. App. 451.

Sec. 21 of the Municipal Court act provides: "there shall be no stated terms of the municipal court, but said court shall always be open for the transaction of business. Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court: Provided, a motion to vacate, set aside or modify the same be entered in said municipal court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, *** shall be entered within thirty days after the entry of such judgment, *** the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said

filed a petition in behalf of [illegible]. [illegible]
[illegible] time in [illegible], and there [illegible]
[illegible] to [illegible] a petition [illegible]
defendant July 23, 1943. [illegible]
to its petition and [illegible] to secure [illegible]
Fenhandt's petition [illegible]
motion [illegible] [illegible].

[illegible] petition [illegible] [illegible]
and the court [illegible] [illegible]
ment was [illegible] [illegible]
motion to strike. [illegible]
that the question [illegible]
ment was not [illegible]
petition [illegible]
Court and [illegible]
and petition [illegible]

Sec. 22 of [illegible] [illegible]
be no stated term [illegible]
always [illegible]
order or [illegible]
to [illegible]
same [illegible]
ing the [illegible]
provided [illegible]
entered in [illegible]
of such [illegible]
said or [illegible]
shall [illegible]
not be [illegible]
will of [illegible] to [illegible]

municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity."

The order of the Municipal court opening up the judgment and giving defendant leave to defend on the merits, having been entered more than thirty days after the entry of the judgment, is an appealable order. Welley v. Klein, 257 Ill. App. 171.

The question for decision is whether defendant's petition, as amended, sets up such facts as would be required in a bill in equity filed in the Circuit or Superior courts. Welley v. Klein, 257 Ill. App. 171.

The substance of the allegations of the verified petition is that Joseph E. Keary, who swears to the petition, was president of the defendant corporation and had entire charge of defendant's business; that no one else was connected with defendant's office except Mrs. Grady, who was unfamiliar with business, having recently succeeded to her late husband; that at the time the summons was left at the office of defendant corporation, Keary, the president, was confined to his home as the result of an automobile accident and was unable to return for several weeks; that he never heard of the suit until July 3rd, when a demand for payment by execution was made upon defendant, which was more than thirty days after the judgment was entered; that defendant had a meritorious defense to plaintiff's claim; that plaintiff was never employed "at wages by the defendant" and therefore had no claim for wages; that the plaintiff operated as a "jobber of the merchandise of the defendant and sometimes received a commission upon sales made of the merchandise;" that defendant was not indebted to plaintiff in any amount, but on the contrary plaintiff was indebted to defendant on two separate accounts, one for $14.02 for advances and loans made to plaintiff by defendant, and another item of $492.83 due from

[illegible]

plaintiff to defendant for merchandise furnished by defendant to the Continental Manufacturing Co. of Chicago at plaintiff's special request, and for which plaintiff agreed to pay in case the Continental Manufacturing Co. failed to do so, and that said Continental company was in bankruptcy.

The petition further set up that since defendant did not owe plaintiff any sum for wages or otherwise, plaintiff had no claim for $25 attorney's fees as set up in his statement of claim; that plaintiff's statement of claim, as filed in the suit, did not meet the requirements of Par. 14, Chap. 13, Ill. State Bar Stats. 1935.

After the filing of this petition on July 15th, as stated, there appears in the record what purports to be a claim made by plaintiff on defendant for wages, which was filed in the Municipal court July 23rd. Obviously, this notice can be given no consideration on this appeal.

Upon this appeal the allegations of the petition which we have above stated must be taken to be true. It obviously appears from the allegations of the petition that defendant was not indebted to plaintiff, and therefore defendant had shown a meritorious defense.

But plaintiff further contends that before the court is warranted in opening up a default judgment after more than thirty days have elapsed, under the provisions of Sec. 21 of the Municipal Court act, the defendant must show that he was not guilty of negligence, and that in the instant case defendant's petition and the amendment to it clearly show that defendant was negligent in failing to take notice of the summons served on it by leaving a copy, etc., with Mrs. Grady. We think this contention must be sustained. The record discloses that the summons was regularly served by the bailiff of the Municipal court on the defendant by leaving a copy of it, together with other necessary papers, with Mrs. Grady, and there is no

plaintiff to defendant for personal injuries received by defendant in the Continental Manufacturing Co. of Chicago at plaintiff's special request, and for which plaintiff agrees to pay in case the Continental Manufacturing Co. failed to do so, and that said Continental company was in bankruptcy.

The petition further set up that since defendant did not owe plaintiff any sum for work or services, plaintiff had no claim for pay attorney's fees as set up in his petition; that plaintiff's statement of claim, as filed in the court, did not meet the requirements of par. 1a, chap. 24, Ill. Rev. Stat. 1925.

After the filing of this petition on April 1st, 1926, there appears in the record that parties to be a stipulation by plaintiff on defendant for water, which was filed in the municipal court July 23rd. Obviously, this point can be given no consideration on this appeal.

Upon this appeal the allegations of the petition which we have above stated must be taken as true. It strongly appears from the allegations of the petition that defendant was not indebted to plaintiff, and therefore defendant had about a [illegible] defense.

Had plaintiff further contended that [illegible] is entitled to compensation up a [illegible] [illegible] have alleged, under [illegible] [illegible] act, the defendant must [illegible] [illegible] and that in the [illegible] [illegible] to it [illegible] [illegible] notice of the [illegible] [illegible] [illegible] Ordy. To think this [illegible] [illegible] [illegible] clause that the [illegible] was [illegible] by the [illegible] [illegible] municipal court on the [illegible] [illegible] [illegible] with other necessary [illegible] [illegible] [illegible] [illegible]

allegation in the petition or the amendment that anything was done with the summons or any attention paid to it.

In Travel Ins. Co. v. Wagner, 279 Ill. App. 13, where a motion was made to open up the judgment after the lapse of more than thirty days, we said (pp. 14-15): "It is well established that where final judgment has been entered and the term has expired the court has no longer jurisdiction to vacate the judgment except where the petition to vacate asserts some error of fact unknown to the court at the time judgment was rendered as well as one which would have precluded the rendition of the judgment, such as fraud, duress or excusable mistake without negligence on the part of the defendant." Citing cases. And continuing we said, in the same case on page 16: "As stated in Imbrie v. Bear, 230 Ill. App. 155, 'It is well settled that relief will be barred where the applicant has been guilty of negligence, and that an agent's or attorney's neglect or want of diligence is binding on the principal.'"

In Lynn v. Multhauf, 279 Ill. App. 210, where default judgment had been entered at a prior term and the defendant given leave to appear and defend on the merits, the court said (p. 215):

"The original proceeding is not before us for consideration, and, therefore, this court is not concerned with the pleadings therein. Mitchell v. King, 187 Ill. 452.

"Where a party has been served with summons, but has neglected to appear and defend, he cannot be relieved against his own negligence so to do. Marnik v. Cusack, 317 Ill. 362.

"The entry of the judgment may have created a hardship against the defendants but they were given an opportunity to present their defense and neglected so to do." And continuing, the court said (p. 216):

"Defendants may have some relief, but it is not by a proceed-

allegation in the petition or the amendment that anything was done with the assent or any acquiescence on [illegible].

In Travel Inc. [illegible] v. Wagner, [illegible] Ill. App. [illegible], where a motion was made to quash [illegible] these [illegible] than thirty days, we said [illegible] that where their judgment was [illegible] entered [illegible] plied the court was no longer [illegible] except where the petition is verified [illegible] known to the court at the time judgment was rendered [illegible] one which would have precluded the [illegible] as fraud, duress or excusable mistake [illegible] part of the telephone, [illegible] cases. [illegible] in the same case on page 167: "As stated in [illegible] Ill. App. 3d, 'it is well [illegible] where the evidence has been [illegible] agent's or attorney's neglect or [illegible] the principal.'"

In Lyons v. Smith, [illegible] ment was [illegible] to appear and defend [illegible]

"[illegible] and, therefore, [illegible] therein. Alexandi v. [illegible], [illegible]

"There is [illegible] associated in [illegible] one [illegible] v. [illegible]

"The entry [illegible] the defendants [illegible] before [illegible] (p. 316):

"[illegible]

ing such as this," and the order opening up the judgment was reversed.

In the instant case the record discloses that defendant neglected to appear, although it was served with summons; therefore the court was not warranted in opening up the judgment.

And while the record discloses that the court was not warranted in entering judgment against defendant on his statement of claim because it was not verified, yet that question is not before us on this appeal. And as said in the Lynn case (279 Ill. App. 210 - 214): "Defendants may have some relief, but it is not by a proceeding such as this."

The order of the Municipal court of Chicago is reversed.

ORDER REVERSED.

McSurely, P. J., and Matchett, J., concur.

ing such as this," and the order upholding the judgment was reversed.

In the instant case the trial court disregarded the decision rendered in Moore, although it was entirely with authority; therefore the court was not warranted in granting the judgment.

And while the record discloses that the court was not warranted in entering judgment against defendant on the contention of claim because it was not verified, yet that question is not before us on this appeal. And as said in the Moore case (27 Ill. App. 414 - 416): "Defendants may have some relief, but it is not by a proceeding such as this."

The order of the municipal court is reversed.

Order reversed.

McNurlin, P. J., and Gatewood, J., concur.

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38260

EDELMAN BROS., INC., a corporation, et al., Appellees,	)	APPEAL FROM CIRCUIT COURT
v.	)	OF COOK COUNTY.
CHARLES BAIKOFF et al., Appellants.	)	284 I.A. 651

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal from an order finding certain respondents guilty of contempt for violating an interlocutory injunctional order entered July 13, 1934, and imposing sentences as follows: Charles Baikoff, twenty days in jail and $250 fine; Paul Baikoff, $250 fine; Harold Guberman, $200 fine; Harry Lieberman, $150 fine, and Frank Segal, $150 fine. The said respondents have appealed from the order and will hereinafter be called appellants.

In our opinion upon the appeal of seven respondents from the order granting the temporary injunction (Edelman Bros., Inc. et al. v. Baikoff et al., 277 Ill. App. 432), wherein we affirmed the action of the chancellor, the substance of complainants' bill is stated. The material part of the temporary injunctional order is as follows:

"It is adjudged and decreed that defendants (naming them), their officers, agents, employees, etc., and all persons acting under their control, and each of them, be restrained and enjoined, until further order of the court, 'from standing upon, using or occupying the public sidewalks in front of their respective places of business on Halsted street, Chicago, or the public sidewalks adjacent or contiguous thereto, for the purpose of selling or seeking to sell articles of merchandise to pedestrians or passersby, or in asking for or soliciting trade or patronage of any pedestrian or passerby using the aforesaid public sidewalks, and from making, causing, permitting or allowing to be made upon said public street (Halsted street), where defendants or any or either of them are engaged in business, or in such close proximity thereto as to be

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SHELMAN BROS., INC., a corporation, et al., Appellees,	
v.	
CHARLES BAIKOFF et al., Appellants.	

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

284 F.A. 631

MR. PRESIDING JUDGE GERALD MCALLISTER THE OPINION OF THE COURT.

An appeal from an order finding certain respondents guilty of contempt for violating an interlocutory injunctional order entered July 13, 1934, and imposing sentences as follows: Charles Baikoff, twenty days in jail and $250 fine; Paul Baikoff, $50 fine; Harold Cuberson, $200 fine; Harry Ilberman, $100 fine, and Frank Vogel, $150 fine. The said respondents have appealed from the order and will hereinafter be called appellants.

In our opinion upon the appeal of seven respondents from the order granting the temporary injunction (Shelman Bros., Inc., et al., v. Baikoff et al., 277 Ill. App. 444), reversed in part the action of the chancellor, the substance of court's ruling is stated. The material part of the temporary injunctional order is as follows:

"It is adjudged and decreed that [illegible] (hereinafter their officers, agents, employees, etc., are all persons acting under their orders, and each of them, be and [illegible] enjoined until further order of the court, from standing upon, using or occupying the public alleyway in front of their premises so as of obstruct or hinder access, egress, or the public alleyway to and to call attention to merchandise to passersby or passersby, or in making for or soliciting trade or patronage of any pedestrian or passerby using the alleyway, and from making, causing, permitting or allowing to be made, [illegible] public street (Halsted street), where [illegible] or any [illegible] are engaged in business, or in such close proximity thereto as to be

distinctly and loudly audible upon such public street, any noise of any kind by crying, calling or shouting, for the purpose of advertising any goods, wares or merchandise, or of attracting attention or inviting the patronage of any person to any of the businesses operated by the aforesaid defendants, or any or either of them, and from interfering with or impeding any pedestrian or passerby upon the public sidewalk in front of the places of business of said defendants, or any or either of them, or the public sidewalk adjacent or contiguous thereto, as prayed for in plaintiffs' complaint.'"

Our opinion upon the appeal from the interlocutory injunctional order was filed November 27, 1934, and on December 8, 1934, plaintiffs filed a petition for an attachment for contempt of court against Charles Baikoff and Paul Baikoff alleging wilful violations of that order. Thereafter, by an additional petition, other defendants were made parties. No complaint was made as to the sufficiency of the petition; the court granted defendants the time they requested for the filing of answers and set the matter for hearing at a date satisfactory to them. The hearing commenced on December 27, 1934, the evidence for both sides was concluded on January 3, 1935, and counsel for plaintiffs and respondents submitted the matter to the court without argument. The court found appellants guilty of wilful contempt of court in violating the injunctional order. Counsel for appellants asked the court to postpone the entry of the formal order to give them time to prepare the record for appeal, and upon the further ground that respondents "want some time to arrange their affairs." The court then continued the cause until January 7, 1935, "for the purpose of entering sentence." Upon that date new counsel appeared for defendants and asked leave to file their appearance "in lieu of Mr. Halligan," which motion was allowed. The new counsel then filed, by leave of court, a written omnibus motion, supported by affidavits, and the court, after a consideration of the same, denied it. The motion takes up fifty pages of the abstract. It first moves for a continuance of the cause, and if that motion is denied, it moves that the cause be reopened for the purpose of

distinctly and loudly audible upon such public street, any noise or any kind by crying, calling or shouting, for the purpose of advertising any goods, wares or merchandise, or of attracting attention or inviting the patronage of any person to any of the businesses operated by the aforesaid defendants, or any of either of them, and from interfering with or impeding any pedestrian or passerby upon the public sidewalk in front of the places of business of said defendants, or any of either of them, or the public sidewalk adjacent or contiguous thereto, as prayed for in plaintiffs' complaint."

Our opinion upon the appeal from the interlocutory injunctional order was filed November 27, 1934, and on December 3, 1934, plaintiffs filed a petition for an attachment for contempt of court against Charles Sainoff and Saul Tulcoff alleging illegal violations of that order. Thereafter, by an additional petition, other defendants were made parties. No complaint was made as to the sufficiency of the petition; the court granted defendants the time they requested for the filing of answers and set the matter for hearing at a date satisfactory to them. The hearing commenced on December 17, 1934, the evidence for both sides was concluded on January 3, 1935, and counsel for plaintiffs and respondents argued the matter to the court without argument. The court [illegible] guilty of willful contempt of court in violating the injunction [illegible]. Counsel for appellants asked the court to postpone [illegible] the final order to give them time to prepare [illegible], and upon the further ground that respondents "[illegible] change their affairs." The court then continued [illegible] until January [illegible], 1935, "for the purpose of entering [illegible]." [illegible] counsel appeared for defendants and asked leave to file [illegible] "in lieu of Mr. Hallinan," which motion was allowed. [illegible] counsel then filed, by leave of court, a written opinion [illegible], supported by affidavits, and the court, after [illegible], denied it. The motion takes up [illegible] argument. It first moves for a continuance [illegible], and if this motion is denied, it moves that [illegible] be reopened for the purpose of

enabling the respondents to submit further evidence. If that motion is denied, it moves "to quash and strike from the files the complaints and petitions for contempt filed herein. To vacate the rules to show cause entered herein against said respondents, to vacate, dissolve or modify the order of injunction of July 13th, 1934, and to expunge any record of findings or conviction or sentence upon the following grounds of fact and law hereinafter set forth, all of which facts these respondents now submit and offer to prove by competent evidence, to-wit: That the findings of guilty and sentences announced are or should be expunged and held for naught * * *." Sixty grounds, some of them divided into many alphabetical subheads, are then set up. A number bitterly assail the good faith, honesty and credibility of plaintiffs and their methods of doing business. Some allege that the ordinances set up in the petition and injunction have not been enforced in the city of Chicago, have been openly and continuously overlooked by the administrative officials and police department of the city, and that many individuals and companies (naming them) have violated the ordinances and have not been prosecuted for the violations; that the said ordinances are contrary to the constitution of the state of Illinois and to the constitution of the United States; that "said ordinances and injunction issued thereon are otherwise illegal and void." The motion concludes with a motion for a rule against plaintiffs to show cause "why they should not be punished for contempt of this Court in obstructing, impeding and interfering with justice and the witnesses of the respondents, and in perjuring and in offering bribes and inducements to witnesses to testify falsely in this cause." The general motion also contemplated a trial of the charges that administrative officials and the police department of the city of Chicago had permitted many violations of the ordinances.

enabling the respondents to submit further evidence. If that motion is denied, it moves "to quash and strike from the files the complaints and petitions for contempt filed herein. To vacate the rules to show cause entered herein against said respondents, to vacate, dissolve or modify the order of injunction of July 15th, 1924, and to expunge any record of findings or convictions or sentence upon the following grounds of fact and law hereinafter set forth, all of which facts these respondents now submit and offer to prove by competent evidence, to-wit: That the findings of guilty and sentences announced are or should be expunged and held for naught * * *." Sixty grounds, some of them divided into many alphabetical subheads, are then set up. A number directly assail the good faith, honesty and credibility of plaintiffs and their methods of doing business. Some allege that the ordinances set up in the petition and injunction have not been enforced in the city of Chicago, have been openly and continuously overlooked by the administrative officials and police department of the city, and that many individuals and companies (naming them) have violated the ordinances and have not been prosecuted or the violations; that the said ordinances are contrary to the constitution of the state of Illinois and to the constitution of the United States; that "said ordinances and injunction insofar therein are otherwise illegal and void." The motion concludes that a motion for a rule against plaintiffs to show cause "why they should not be punished for contempt of this Court in disobeying, impeding and interfering with justice and the officers of the respondents, and in participating and in aiding, bribes and inducements to witnesses to testify falsely in this cause." The general motion for contemplation of trial of the charges that administrative officials and the police department of the city of Chicago had permitted many violations of the ordinances,

After the general motion had been presented, counsel for respondents orally moved the court "to hold the plaintiffs in contempt of court," which motion was denied.

The charge made in appellants' brief that they "were deprived of their day in court, a reasonable opportunity to defend, and the attendance of witnesses to support such defense," is without the slightest foundation, and many of the arguments made in their brief are entirely out of place in this court. The record shows that the chancellor gave respondents full opportunity to present their evidence and to make their defense. The respondents did not ask for a bill of particulars nor for a continuance before or during the trial. There is nothing in the report of proceedings to indicate that the several counsel who represented the defendants during the hearing of the evidence were surprised by reason of any matters that developed. It is apparent that the counsel fully understood the charges made against defendants, and no suggestion was made, during the trial, that defendants were unprepared to meet the charges. At the conclusion of the evidence no statement or suggestion was made that defendants would like an opportunity to produce further evidence. The affidavit of Attorney Halligan, attached to the motion, in so far as it states that he was surprised by plaintiffs' evidence and that he had not had a reasonable opportunity to present a proper defense, is flatly contradicted by his conduct during the trial, as shown by the report of proceedings. Nor is there any warrant for the claim that the trial court was impatient in passing upon the written motion of respondents. He listened to the argument of counsel for respondents in support of the motion for two hours and fifteen minutes. The greater part of the motion relates to alleged matters wholly irrelevant to the proceedings before the chancellor. In passing upon the motion the chancellor said: "I, having heard the substance of these motions and supporting affidavits, and having considered their relevancy,

After the general motion had been presented, counsel for respondents orally moved the court "to hold the plaintiffs in contempt of court," which motion was denied.

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competency and materiality, and having considered only what I regard as material, I overrule your objections and leave is given to file these motions and supporting affidavits, attached thereto." The cause had been heard and determined adversely to respondents, and the evident assumption that a new counsel's bold advocacy of an anomalous motion could wipe out all of the prior proceedings and change the action into a contempt proceeding against the plaintiffs, would test the patience of any trial judge.

Appellants contend that the ordinances, which are the basis for the suit, the injunction and the contempt proceedings, are void because (a) they are unreasonable, (b) because they do not operate with equality. To this contention petitioners answer that our former decision is res judicata of the question of the validity of the ordinances. Respondents rejoin that "the question of the validity of the ordinance was not raised by the parties, and the court did not do so of its own motion. Hence, there is no res judicata on this point." From an inspection of the briefs in the former appeal we find that the appellants did not raise the question of the validity of the ordinances. Upon that hearing the validity of the ordinances was assumed and the main point urged was that "the court erred in issuing the temporary injunction since no facts were pleaded in the bill of complaint which charge the defendants with violation of Sections 1008 and 1009 and 4194 of the Municipal Code of the City of Chicago," and appellants argued that an enforcement of the provisions of the ordinances would promptly and efficiently abate the maintenance of a nuisance; that by the application of severe penalties it would make it unprofitable for any person to continue to violate the law, and that as the plaintiffs failed to allege in the bill that an enforcement of the ordinances would not abate the nuisance the ordinances were intended to prevent, plaintiffs were not entitled to the relief they sought. The doctrine of res judicata

competency and materiality, and having considered only what I regard as material, I overrule your objections and leave is given to file these motions and supporting affidavits, attached thereto." The cause had been heard and determined adversely to respondents, and the evident assumption that a new counsel's bad advocacy of an anomalous motion could wipe out all of the prior proceedings and change the action into a contempt proceeding against the plaintiffs, would test the patience of any trial judge.

Appellants contend that the ordinances, which are the basis for the suit, the injunction and the contempt proceedings, are void because (a) they are unreasonable, (b) because they do not operate with equality. In this contention petitioners answer that our former decision is res judicata of the question of the validity of the ordinances. Respondents relate that "the question of the validity of the ordinance was not raised by the petition, and the court did not do so of its own motion." [illegible], there is no res judicata on this point. [illegible] in our former appeal we find that the appellants did not raise the question of the validity of the ordinances. Upon [illegible] the validity of the ordinances was assumed and [illegible] argued was that "the court erred in issuing and [illegible] injunction since no facts were pleaded in the bill of complaint [illegible] the violation of sections 1009 and 1009 and 412 of the 'municipal Code of the City of Chicago,' and appellants argued in an amicus brief that the provisions of the ordinances would [illegible] and [illegible] the maintenance of a nuisance; that by the application of [illegible] penalties it would make it impossible for any person to [illegible] to violate the law, and that as the plaintiffs failed to allege in the bill that an enforcement of the ordinances would not abate the nuisance the ordinances were inherently [illegible]. [illegible] not entitled to the relief they sought. [illegible] res judicata

extends not only to the questions actually decided, but to all grounds of recovery or defense which might have been presented. (Harding Co. v. Harding, 352 Ill. 417, 426, and cases cited therein.) From the record it is clear that appellants are in no position to now raise the question of the invalidity of the ordinances. However, if we were to pass upon the question involved in the instant contention, we would not sustain appellants' position.

Appellants contend that plaintiffs were (a) guilty of inequitable conduct; (b) consented, procured or induced violations; (c) guilty of laches; (d) that the proceeding is merely to punish defendants rather than to protect plaintiffs from injury. We have carefully considered the points raised in the contention and find them without merit. Appellants complain that the injunction issued July 13, 1934; that the contempt proceedings were not instituted until December 8, 1934, and that therefore plaintiffs were guilty of laches; also that the proceedings were not filed in good faith. Although the evidence shows that after the appeal was taken from the preliminary injunctional order certain of the respondents immediately violated the order, nevertheless, plaintiffs did not commence the contempt proceedings until the order was affirmed by this court on November 27, 1934, when they gave notice to the defendants of our ruling and requested them to desist from violating the injunction. As certain defendants still continued to violate the injunction the instant petition was filed on December 8, 1934. On December 12, 1934, plaintiffs filed an additional petition bringing in other defendants. When the case was called for trial fifteen defendants, some of them individuals and some of them corporations, "confessed the violation of the injunction," and the court, after finding "extenuating and mitigating circumstances in connection with the aforesaid violations," fined each one dollar and no costs. The court found two of the respondents, Louis Gabel and Jack Raskin, not guilty.

extends not only to the questions actually decided, but to all grounds of recovery or defense which might have been presented. (Harding Co. v. Harding, 334 Ill. 417, 422, and cases cited therein.) From the record it is clear that appellees are in no position to now raise the question of the invalidity of the ordinances. However, if we were to pass upon the question involved in the instant contention, we would not sustain appellees' position.

Appellants contend that plaintiffs were (a) guilty of inequitable conduct; (b) connected, procured or induced violations; (c) guilty of laches; (d) that the proceeding is merely to punish defendants rather than to protect plaintiffs from injury. We have carefully considered the points raised in the contention and find them without merit. Appellants contend that the injunction issued July 12, 1954; that the contempt proceedings were not instituted until December 6, 1954, and that [illegible] plaintiffs were guilty of laches; also that the proceedings are [illegible] in bad faith. Although the evidence shows that [illegible] the appeal [illegible] from the preliminary injunction [illegible] the contemporaneous [illegible] violations of the order, nevertheless, plaintiffs did not commence the contempt proceedings until [illegible] and affirmed by this court on November 17, 1954, when they [illegible] to the defendants of our ruling and [illegible] from [illegible] the injunction. [illegible] the injunction [illegible] the injunction [illegible] the instant [illegible] on December 14, 1954, plaintiffs filed an [illegible] in other defendants. [illegible] fifteen defendants, some of them [illegible] the [illegible] "confessed the violation of the injunction," [illegible] "accounting and [illegible] in connection with the above-said violations." [illegible] no [illegible] two of the respondents, [illegible] book-making, not guilty,

Appellants contend that "the conviction is against the clear weight of the evidence," and they argue that the guilt of the respondents must be established by clear and satisfactory evidence and that a mere preponderance of the evidence is not sufficient.

"Contempts have been classified as criminal contempts and civil contempts. The former includes acts in disrespect of the court or its process and those tending to bring the court into disrepute or obstruct the administration of justice. Civil contempts have been characterized as quasi-contempts, and consist in failing to do something which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. In such a case the process is civil. (Hake v. People, 230 Ill. 174; Holbrook v. Ford, 153 id. 633.) In this class of cases, while the authority of the court may be said to be incidentally vindicated, its power is called into exercise for the benefit of a private litigant and not in the public interest, merely. If imprisonment is ordered, it is not as a punishment but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interests and rights which he could not otherwise procure. People v. Elbert, 287 Ill. 458; O'Brien v. People, 216 id. 354; Loven v. People, 158 id. 159; People v. Diedrich, 141 id. 665; Crook v. People, 16 id. 534." (Wilson v. Prochnow, 359 Ill. 148, 151.)

In a proceeding to punish for contempt in violating an injunction civil rights, only, are involved, and the violation of the injunction may be established by a preponderance of the evidence, as proof beyond a reasonable doubt is not required in civil cases. (People v. Buconich, 277 Ill. 290; State of Illinois v. Froelich, 316 Ill. 77, 85; People v. Kowalski, 307 Ill. 378, 385; West Disinfecting Co. v. Koppelman, 216 Ill. App. 438, 453; Hake v. People, 230 Ill. 174, 192; Flannery v. People, 225 Ill. 62, 71.)

We shall first pass upon the question as to whether plaintiffs proved respondents Charles Baikoff and Paul Baikoff guilty of wilfully violating the interlocutory injunctional order: Charles Baikoff was the proprietor of a "men's clothing" business, operated at 1218 South Halsted street, and Paul Baikoff, his brother, was his employee and "solicitor." Paul Baikoff had been admitted to practice law in the state of Illinois. There is a lobby in the Baikoff place of business, about fifteen feet deep. It is about five or six feet wide at the edge of the sidewalk and it narrows as it approaches

Appellants contend that "the conviction is against the clear weight of the evidence," and that "the facts [illegible] of the respondents must be established by clear and satisfactory evidence and that a mere preponderance [illegible] be by [illegible] not sufficient.

> "Contempts have been classified as criminal contempts and civil contempts. The former includes acts in disrespect of the court or its process and those tending to [illegible] the public disrepute or obstruct the administration of justice. Civil contempts have been characterized as quasi-contempts, and consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. In such a case the process is civil. (Hake v. People, 230 Ill. 174; Holbrook v. Ford, 105 id. 633.) In this class of cases, while the authority of the court may be said to be incidentally vindicated, its power is called in to enforce for the benefit of a private litigant and not in the public interest, merely. If imprisonment is ordered, it is not [illegible] punishment but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interests or rights which he could not otherwise procure. People v. Ahern, 247 Ill. 466; O'Brien v. People, 216 id. 354; Lyons v. People, 158 id. 138; People v. Diedrich, 141 id. 664; Cooke v. People, 1[illegible] id. 326; Ilsen v. Lockmon, 350 Ill. 158, 161.)

In a proceeding to punish for contempt in violating an injunction civil rights, only, are involved, and only a [illegible] of the injunction may be established by a preponderance of the evidence, [illegible] proof beyond a reasonable doubt is not required in civil cases. People v. Buccolo, 277 Ill. 290; State of Illinois v. Crooks, [illegible] 85; People v. Kowalski, 307 Ill. 370, 38[illegible]; [illegible] v. Koppelman, 216 Ill. 4[illegible], 438; Hake v. [illegible], [illegible] 192; Flannery v. People, 229 Ill. 85, 91.)

We shall first pass upon the question as [illegible] Plaintiffs proved respondents Charles Balkoff and Paul Balkoff [illegible] willfully violating the injunctory [illegible] Charles Balkoff was the proprietor of a "man's clothing" business, [illegible] 1[illegible] South Halsted street, and Paul Balkoff, the [illegible], was his employee and "solicitor." Paul Balkoff has been [illegible] practicing law in the state of Illinois. There is a lobby in the Balkoff [illegible] of business, about fifteen feet deep. It is about five or six feet wide at the edge of the sidewalk and it [illegible] as it approaches

the door, making the width of the lobby near the door about three or four feet wide. On both sides of the lobby are "vestibules," inclosed in glass, commonly called show windows. Charles Baikoff, in the first part of his testimony, stated that for ten years prior to the date of the entry of the temporary injunction he had solicited on both sides of the street; that after he was served with the injunctional order "he did not continue to do the things" that he had done prior to the injunction. Later in his testimony he stated that he gave orders to Paul Baikoff and other employees to stay in the lobby and not to go out on the street soliciting; that his counsel had advised him that the lobby was not covered by the injunctional order. That Paul Baikoff wilfully violated the injunction was clearly proven by the evidence. His method of doing business is shown by the testimony of Frank J. Thomas. Thomas had just left the store of Turner Brothers and was walking south on the sidewalk on the west side of Halsted street when Paul Baikoff came out of his brother's place of business. He had a little stick in his hand, seven or eight inches long, with which he tapped Thomas on the shoulder, at the same time asking him if he wanted to purchase a garment "in his store." Thomas responded that he did not and that he was not then interested in buying clothes. As Thomas continued to walk Paul grabbed his hand, took him into the lobby of the store, and persuaded him to enter it to see the merchandise on display there. In the store Paul showed him a garment, but Thomas was not interested in purchasing clothes and he started to leave the store, whereupon Paul took his hand and pulled him back into the store, at the same time saying that he ought to get a garment, as the prices were so low. Several other witnesses testified to like conduct on the part of Paul Baikoff. Police Officer Byron G. Sovea testified that he had traveled the beat in the neighborhood for some time; that he knew Paul Baikoff well and had seen him off and on at the place of business, 1218 South

the door, making the width of the lobby [illegible] about three or four feet wide. On both sides of the lobby were "vestibules," inclosed in glass, commonly called show windows. Thomas testified, in the first part of his testimony, stated that for two years prior to the date of the entry of the temporary injunction he had noticed on both sides of the street; that after he was served with the injunctional order "he did not continue to do the things" that he had done prior to the injunction. Later in his testimony he stated that he gave orders to Paul Ballroff and other employees to stay in the lobby and not to go out on the street soliciting; that his counsel had advised him that the lobby was not covered by the injunctional order. That Paul Ballroff willfully violated the injunction was clearly proven by the evidence. His method of doing business is shown by the testimony of Frank L. Thomas. Thomas had just left the store of Turner Brothers and was walking [illegible] on the west side of Halsted street when Paul Ballroff came out of his brother's place of business. He had a little stick in his hand, seven or eight inches long, with which he tapped Thomas on the shoulder, at the same time asking him if he wanted to purchase a garment in his store." Thomas responded that he did not and that he was not interested in buying clothes. As Thomas continued to walk Paul grabbed his hand, took him into the lobby of the store, and persuaded him to enter it to see the merchandise on display there. In the store Paul showed him a garment, but Thomas was not interested in purchasing clothes and he started to leave the store, whereupon Paul took his hand and pulled him back into the store, [illegible] saying that he ought to get a garment, as the prices were so low. Several other witnesses testified to like conduct on the part of Paul Ballroff. Police Officer Byron C. Moves testified that he had travelled the beat in the neighborhood for some time; that he knew Paul Ballroff well and had seen him out and on at the place of business, [illegible] south

Halsted street; that on December 13, 1934, he saw Paul standing in the lobby of his store and stopping the people that were going by the store; that as the people stopped he pointed to different suits and overcoats in the window; that he (the witness) walked over to Paul and said: "'I thought there was an injunction on the street restraining you men from molesting people.' Well, he says, 'There is, but that don't mean much.' I says, 'Listen, I am a police officer in uniform and the court may have people out watching me and you, too. I don't want to be put in the middle.' I says, 'I wish you wouldn't do it.'" Appellants contend that the only evidence against Charles Baikoff is that of Max Shore, who testified that on December 26, 1934, he saw Charles Baikoff approaching a man and woman about twenty feet from the lobby of his store and that he heard Baikoff say to them, "Come right in, don't cost you nothing, beautiful suit at a bargain." Shore was president of the Shore Radio Stores, Inc., doing business at 1242 South Halsted street, and was also president of the "Halsted-Roosevelt Business Men's Association." Plaintiffs in the instant action are members of that association. Charles Baikoff contradicted the testimony of Shore, and appellants contend that as Shore is president of said association and his company is one of the plaintiffs in the case he was an interested witness, and that in that state of the record the trial court should have found Charles Baikoff not guilty. The injunctional order enjoins the defendants, their agents, salesmen, solicitors or employees and all persons acting under their control, from doing the things therein specified, and likewise from permitting the same to be done.

"Sec. 1438. Permitting violation by others a contempt. It is the clear duty of one who is enjoined from the commission of a particular act not only to refrain from doing the act in person, but also to restrain his employees from doing the thing forbidden, and a mere passive and personal obedience to the order will not suffice. And when, by his own negligence and inattention, one who has been enjoined permits his agents, partners and employees to do the prohibited act, he may be punished for contempt in dis-

Belated street; that on December 15, 1934, he saw Paul standing in the lobby of his store and stopping the people that were going by the store; that as the people stopped he pointed to different suits and overcoats in the window; that he (the witness) walked over to Paul and said: "I thought there was an injunction on the street restraining you men from molesting people." Well, he says, 'There is, but that don't mean much.' I says, 'Listen, I am a police officer in uniform and the court may have people out watching me and you, too. I don't want to be put in the middle.' I says, 'I wish you wouldn't do it.'" Appellants contend that the only evidence against Charles Baikoff is that of Max Shore, who testified that on December 26, 1934, he saw Charles Baikoff approaching a man and woman about twenty feet from the lobby of his store and that he heard Baikoff say to them, "Come right in, don't cost you no thing, beautiful suit at a bargain." Shore was president of the Shore Radio Stores, Inc., doing business at 1324 South Halsted street, and was also president of the "Halsted-Roosevelt Business Men's Association." Plaintiffs in the instant action are members of that association. Charles Baikoff contradicted the testimony of Shore, and appellants contend that as Shore is president of said association and his company is one of the plaintiffs in the case he was an interested witness, and that in that state of the record the trial court should have found Charles Baikoff not guilty. The injunctional order enjoins the defendants, their agents, salesmen, solicitors or employees and all persons acting under their control, from doing the things therein specified, and likewise from permitting the same to be done.

"Sec. 1638. Forbidding violation by others a contempt. It is the clear duty of one who is enjoined from the commission of a particular act not only to refrain from doing the act in person, but also to restrain his employees from doing the thing forbidden, and a more passive and perfunctory obedience to the order will not suffice. And then, by his own negligence and instigation, one who has been enjoined permits his agents, servants and employees to do the prohibited act, he may be punished for contempt in vio-

regarding the injunction. And where defendant, against whom an injunction has been issued, negligently fails to take the proper steps to insure obedience to the writ upon the part of his employees, he may be held guilty of a violation of the injunction." (2 High on Injunctions (4th ed.), 1448.)

(See also Poertner v. Russel, 33 Wis. 193, 202; Westinghouse Air Brake Co. v. Christensen Engineering Co., 121 Fed. 562; 16 Am. & Eng. Enc'y of Law, (2d ed.) 437.) Paul Baikoff testified that his duties required him to stand in the lobby "soliciting when people come in the lobby, talking to them. * * * I never complete the sale." Upon the cross-examination of Charles Baikoff the following occurred: "Q. You don't know whether Paul Baikoff accosted anybody on the sidewalk at any time in the past three months, do you? A. I do know that he did not. Q. You are absolutely positive about that? A. Yes, sir. Q. At no time on any day in the past three months did he do anything of that sort? A. No, sir. Q. You know that of your own knowledge? A. Yes, sir." He further testified that when Paul Baikoff commenced working for him, in 1930, he gave him orders not to approach anybody on the sidewalk. "Q. You never gave him any orders since that time? A. No, sir. * * * Q. When the writ of injunction was served upon you did you at that time issue any orders to any of your employees with respect to the subject matter of that injunction writ? A. Why, we talked about it and we got to be very careful. Q. What orders did you give them? Did you give them any orders? A. To stay in the lobby and close to the door. * * * Q. In what respect did you change after the injunction was issued? A. We stayed deeper in the lobby." He further testified that he always had to keep his eye on the front door "for a lot of reasons, and I could see it. * * * Q. If you were there in the store you didn't take your eye off the front door? A. Always had my eye on the front door." After a careful consideration of all of the facts and circumstances in evidence we are satisfied that the trial court was justified in finding that Charles Baikoff pro-

regarding the injunction. And where defendants, against whom an injunction has been issued, negligently fails to take the proper steps to insure obedience to the writ upon the part of his employees, he may be held guilty of a violation of the injunction." (2 High on Injunctions (4th ed.), 1440.)

(See also Portner v. Russel, 33 Wis. 193, 205; Washingtonge Air Brake Co. v. Christensen Engineering Co., 151 Wed. 365; 16 Am. & Eng. Enc'y of Law, (2d ed.) 437.) Saul Bailkoff testified that his duties required him to stand in the lobby "soliciting when people come in the lobby, talking to them. * * * I never complete the sale." Upon the cross-examination of Charles Bailkoff the following occurred: "Q. You don't know whether Saul Bailkoff accosted anybody on the sidewalk at any time in the past three months, do you? A. I do know that he did not. Q. You are absolutely positive about that? A. Yes, sir. Q. At no time on any day in the past three months did he do anything of that sort? A. No, sir. Q. You know that of your own knowledge? A. Yes, sir." Ho Fuchsen testified that when Saul Bailkoff commenced working for him, in 1910, he gave him orders not to approach anybody on the sidewalk. "Q. You never gave him any orders since that time? A. No, sir. * * * Q. When the writ of injunction was served upon you in 1910 at that time issue any orders to any of your employees with respect to the subject matter of that injunction writ? A. No, we talked about it and we got to be very careful. Q. What orders did you give them? Did you give them any orders? A. To stay in the lobby and close to the door. * * * Q. In what respect did you change after the injunction was issued? A. He stayed longer in the lobby." He further testified that he always had to keep his eye on the front door "for a lot of reasons, and I could see it. * * * Q. If you were there in the store you didn't have your eye off the front door? A. Having had my eye on the front door." After a careful consideration of all of the facts and circumstances in evidence we find that the trial court was justified in finding that Charles Bailkoff pro-

cured, or at least, permitted, wilful violations of the injunction by his employee Paul Baikoff.

After a careful examination of all the evidence that bears upon the charges against defendants Harry Lieberman, Frank Segal and Harold Guberman we are not satisfied that the proof sustains the charge against any of them.

Appellants contend that "punishment for contempt should not be imposed if defendants acted unintentionally or in good faith relied on advice of competent counsel." The advice of attorneys is never a justification for contempt. (Anderson v. Macek, 350 Ill. 135, 138; People v. McKeeney, 259 Ill. 161.) In State of Illinois v. Ajster, 318 Ill. 230, 239-240, the court states:

> "If the defendants, instead of complying with the plain words of the decree, chose to rely upon the statement of counsel that they need not obey it they did so at their peril. Advice of counsel to disobey an injunction is no defense to a proceeding for contempt for such disobedience. The case is one not of misinterpretation of the decree but of disobedience to it."

However, the only evidence as to advice of counsel was that of Charles Baikoff, who testified that his attorney, Mr. Halligan, advised him that the injunction did not cover the lobby of his place of business. But the trial court ruled that the lobby was not a part of the sidewalk, and therefore the alleged advice did not apply to the acts for which the Baikoffs were found guilty. There is, of course, no merit in the suggestion that if the Baikoffs violated the injunction they did so unintentionally. The trial court, in announcing his finding said: "The respondents whom the court has charged to be guilty of contempt of court did knowingly, willfully and with the intention of violating the injunctional order of court, contemptously on a number of occasions and continuously throughout said period of time," etc. Officer Sovea's testimony shows clearly the attitude of the Baikoffs toward the injunctional order.

It is difficult to consider seriously appellants' contention

cured, or at least, permitted, willful violations of the injunction by his employee Paul Belkoff.

After a careful examination of all the evidence that bears upon the charges against defendants Harry Isbenson, Frank Segal and Harold Dubowsky we are not satisfied that the proof sustains the charge against any of them.

Appellants contend that "punishment for contempt should not be imposed if defendants acted unintentionally or in good faith relied on advice of competent counsel." The advice of counsel is never a justification for contempt. (Hudson v. Hunt, 108 Ill. 182, 188; People v. Mc Canay, 254 Ill. 161.) In Pale of Fidelity v. Alster, 218 Ill. 230, 239-240, the court stated:

> "If the defendants, instead of complying with the plain words of the decree, chose to rely upon the statement of counsel that they need not obey it they did so at their peril. Advice of counsel to disobey an injunction is no defense to a proceeding for contempt for such disobedience. The case is one not of misinterpretation of the decree but of disobedience to it."

However, the only evidence as to advice of counsel was that of Charles Belkoff, who testified that his attorney, Mr. Halligan, advised him that the injunction did not cover the lobby of his place of business. But the trial court's ruling that the lobby was not a part of the alleyway, and therefore the injunction did not apply to the acts for which the Belkoffs were found guilty, There is, of course, no merit in the suggestion that if the defendants violated the injunction they did so unintentionally. The trial court, in announcing its finding said: "the respondents knew the court was charged to be guilty of contempt of court in not, willfully and with the intention of violating the injunction order of court, temporarily on a number of occasions, not continuously throughout the period of time," etc. Officer Cover's testimony shows clearly the attitude of the Belkoffs toward the injunction order.

It is difficult to consider seriously appellants' contention

that "the defendant should not be subjected to cruel and unusual punishment," and that "the punishment should not be discriminatory." Under the facts the petitioners might, with some reason, contend that the court exercised too much leniency in the matter of the punishment of Paul Baikoff. The trial court considered the employer a greater offender than the employee, and we are not disposed to question the trial court's position in that regard. In Hake v. People, supra, the court states (196):

"The law is well settled that a court of chancery may impose a fine alone for the violation of an injunction and commit the party until the fine and costs are paid, or, in its discretion, may fix a definite period of imprisonment, either with or without a fine. The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and upon proceedings for attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the sound legal discretion of the court itself. Courts of appellate jurisdiction are exceedingly averse to interfering with the exercise of such discretion, and will not ordinarily reverse the action of the inferior courts in such matters." (See also Ash-Madden-Rae v. International Ladies Garment Workers' Union, 290 Ill. 301, 306; American Cigar Co. v. Berger, 221 Ill. App. 285, 296.)

Appellants contend that the plaintiffs suffered no damage, injury or loss, and that therefore the convictions should not be sustained. The cases cited in support of this contention have no application to the instant proceeding. Here the complaint upon which the injunction issued alleges that the acts of defendants in soliciting upon the public sidewalks in front of and adjacent to plaintiffs' premises and impeding and interfering with pedestrians using the said sidewalks constitute a nuisance, and that such acts divert patronage, etc., and are destructive of plaintiffs' businesses and property rights. In our opinion upon the appeal from the entry of the injunctional order, we said (p. 448):

"As we read those allegations, the gist of them is that defendants' daily and continuous unlawful acts, as set forth in the bill, are specially injurious to complainants in their trade and business and in the established good will of their customers; i. e., in their property rights."

In Loven v. The People, 158 Ill. 159, 169, the court, in answering a similar contention, said:

that "the defendant should not be subjected to cruel and unusual punishment," and that "the punishment should not be discriminatory." Under the facts the petitioners might, with some reason, contend that the court exercised too much leniency in the matter of the punishment of Saul Zaborit. The trial court convicted the employer a greater offender than the employee, and we are not disposed to question the trial court's position in that regard. In Ex parte v. People, supra, the court states (126):

> "The law is well settled that a court of chancery may impose a fine alone for the violation of an injunction and commit the party until the fine and costs are paid, or, in its discretion, may fix a definite period of imprisonment, either with or without a fine. The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and upon proceedings for attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the sound legal discretion of the court itself. Courts of appellate jurisdiction are accordingly averse to interfering with the exercise of such discretion, and will not ordinarily reverse the action of the inferior courts in such matters." (See also Ex-Madden-Ex v. International Longs Shoremen's Workers' Union, 290 Ill. 301, 306; American Glass Co. v. Burgess, 221 Ill. 386, 388.)

Appellants contend that the plaintiffs suffered no damage, injury or loss, and that therefore the convictions should not be sustained. The cases cited in support of this contention have no application to the instant proceeding. Here the complaint upon which the injunction issued alleges that the acts of defendants in soliciting upon the public sidewalks in front of and adjacent to plaintiffs' premises and impeding and interfering with pedestrians using the said sidewalks constitute a nuisance, and that such acts divert patronage, etc., and are destructive of plaintiffs' business and property rights. In our opinion upon the appeal from the entry of the injunctional order, we said (p. 346):

> "As to read the allegations, the gist of them is that defendants' daily and continuous unlawful acts, as set forth in the bill, are specially injurious to complainants in their trade and business and in the established good will of their customers; i. e., in their property rights."

In Lovell v. The People, 138 Ill. 100, 104, the court, in observing a similar contention, said:

"It is shown that the same interests which were in litigation in the principal suit, and which are protected by the injunction, are being violated, and from these facts, as it seems to us, injury and legal damage will be inferred. There is no suggestion that the complainant has parted with the rights which were the subject of litigation in the principal suit, or has in any way lost its interest therein."

In that case it was stated that in People v. Diedrich, 141 Ill. 665 (cited and relied upon by counsel), the defendant was enjoined from manufacturing, or being interested in the manufacture of, certain furnaces, and the evidence showed that he was manufacturing the furnaces in a territory in which the complainants in the case had no right to manufacture them, and it was held that they could not be injured thereby. In the instant case the place of business of Turner Bros. Clothing Company, one of the plaintiffs, adjoins that of defendant Baikoff. The 12th Street Store, another plaintiff, is in the immediate vicinity of Baikoff's store, and it and the Turner company are engaged, like the Baikoffs, in selling men's clothing. Frank J. Thomas who testified as to the conduct of Paul Baikoff, was a customer of Turner Bros. Clothing Company.

The order of the Circuit court of Cook county, in so far as it relates to Charles Baikoff and Paul Baikoff, is affirmed; in so far as it relates to Harold Guberman, Harry Lieberman and Frank Segal, it is reversed.

ORDER OF THE CIRCUIT COURT OF COOK COUNTY, IN SO FAR AS IT RELATES TO CHARLES BAIKOFF AND PAUL BAIKOFF, IS AFFIRMED; IN SO FAR AS IT RELATES TO HAROLD GUBERMAN, HARRY LIEBERMAN AND FRANK SEGAL, IT IS REVERSED.

Sullivan and Friend, JJ., concur.

"It is shown that the same interests, which were in litigation in the principal suit, and which are protected by the injunction, are being violated, and from this fact, as it seems to us, injury and legal damage will be inferred. There is no suggestion that the complainants have parted with the rights which were the subject of litigation in the principal suit, or are in any way lost to defendants herein."

In that case it was decided that in Lopez v. Maynard, 121 III. 665 (cited and relied upon by counsel), the defendant was enjoined from manufacturing, or being interested in the manufacture of, certain furnaces, and the evidence showed that he was manufacturing the furnaces in a territory in which the complainants in the case had no right to manufacture them, and it was held that they could not be injured thereby. In the instant case the place of business of Turner Bros. Clothing Company, one of the plaintiffs, adjoins that of defendant Bailoff. The Lath Street Store, another plaintiff, is in the immediate vicinity of Bailoff's store, and it and the Turner company are engaged, like the Bailoffs, in selling men's clothing. Frank J. Thomas who testified as to the conduct of Paul Bailoff, was a customer of Turner Bros. Clothing Company.

The order of the Circuit court of Cook county, in so far as it relates to Charles Bailoff and Paul Bailoff, is affirmed; in so far as it relates to Harold Bowman, Harry Hebowman and Frank Engel, it is reversed.

ORDER OF THE CIRCUIT COURT OF COOK COUNTY, IN SO MUCH AS IT RELATES TO CHARLES BAILOFF AND PAUL BAILOFF, IS AFFIRMED; IN SO FAR AS IT RELATES TO HAROLD BOWMAN, HARRY HEBOWMAN AND FRANK ENGEL, IT IS REVERSED.

Sullivan and Friend, JJ., concur.

38260

EDELMAN BROS., INC., a Corporation, et al., Appellees, v. CHARLES BAIKOFF et al., Appellants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

284 I.A. 651

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

Charles Baikoff and Paul Baikoff, defendants and appellants, have filed a petition for rehearing in the above entitled cause.

The said appellants contend that we overlooked the fact that certain alleged acts of violation of the injunction which occurred subsequent to December 8, 1934, the date of the filing of the petition of plaintiffs for a rule to show cause, were allowed in evidence and erroneously considered by the trial court in arriving at its finding of guilt. It may be conceded that witnesses Thomas, Sevez, Turner, Greenbaum, Wolf, the two Hakansons, Marie Bashara and Aubin xxi testified to alleged violations that occurred after the filing of the two petitions for attachment, the first of which was filed on December 8, 1934, and the second on December 12, 1934. John Cresnoe, however, testified to a violation that occurred on November 25, 1934.

The instant proceeding is a civil proceeding and the rules of chancery govern. Both the first and second petitions for attachment charged, in general terms, that all of the defendants daily violated the injunctional order. No specific acts or dates were set up. No demurrer or motion to strike was interposed. No bill

of particulars was requested by any of the defendants. The answers of Charles and Paul Baikoff, filed on December 26, 1934, deny, in general terms, that they have violated and continue to violate the injunctional order, and aver that they have attempted to comply with the order. Each denies "that he has or will continue to indulge in any acts prohibited by the injunctional order," or that any of his acts have been contemptuous of the court. During the trial no objection of any kind was made to the testimony of any of the aforesaid witnesses. The cause was submitted without argument and no point was made during the trial that any of the alleged violations occurred after the petitions had been filed. It is clear that both sides tried the case upon the theory that petitioners had the right, under the petitions, to show any act of violation of the injunctional order, whether it occurred before or after the filing of the petitions. The testimony of the Baikoffs covered the three months' period just prior to the trial. It is conceded, as it must be, that the petitioners had the right to file a supplemental petition to cover any alleged acts that occurred after the filing of the petitions. Had the appellants objected to the testimony in question, petitioners would then have had an opportunity to file a supplemental petition. Where petitioners, in a case like the instant one, make out a prima facie case, under the petition, they have the right to show subsequent acts for the purpose of showing intent and a persistent defiance of the court's order.

It is again argued that "the punishment of the appellant Charles Baikoff was discriminatory, excessive and unreasonable." We have sufficiently answered this contention in our opinion.

The petition of Charles Baikoff and Paul Baikoff for a rehearing in the cause is denied.

PETITION FOR REHEARING DENIED.

Sullivan and Friend, JJ., concur.

of particulars was requested by any of the defendants. The answers of Charles and Paul Bailey, filed on December 20, 1951, deny, in general terms, that they have violated and continue to violate the injunctional order, and aver that they have attempted to comply with the order. Each denies "that he has or will continue to engage in any acts prohibited by the injunctional order," or that any of his acts have been consequences of the court. During the trial no objection of any kind was made to the testimony of any of the alleged witnesses. The cases are submitted without argument and no point was made during the trial that any of the alleged violations occurred after the petitions had been filed. It is clear that both sides tried the case upon the theory that petitioners had the right, under the petitions, to show any act of violation of the injunctional order, whether it occurred before or after the filing of the petitions. The testimony of the Bailey's covered the three months' period just prior to the trial. It is contended, as it must be, that the petitioners had the right to file a supplemental petition to cover any alleged acts that occurred after the filing of the petitions. Had the appellants objected to the testimony in question, petitioners would then have had an opportunity to file a supplemental petition. These petitioners, in a case like the instant one, make out a prima facie case, under the petition, they have the right to show subsequent acts for the purpose of showing [illegible] or intentional defiance of the court's order.

It is again argued that "the testimony of the [illegible] Charles Bailey was circumstantial, relative and [illegible]." We have sufficiently answered this contention in our opinion.

The petition of Charles Bailey [illegible] and asking for a rehearing in the cause is denied.

Sullivan and Friend, JJ., concur.

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38268

UNITED CORK COMPANIES,
a corporation,
Appellee,

v.

CHARLES A. VOLLAND et al.,
Defendants.

BENJAMIN G. KILPATRICK, as
Successor Trustee, HENRY
LANG, JR., and FRED W. VOGT,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

284 I.A. 652

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree finding that plaintiff, United Cork Companies, a corporation, was entitled to a lien for the sum of $3,498.22; that intervening petitioner Carl Westberg & Company was entitled to a lien for the sum of $6,055.79; that Midwest Engineering & Equipment Company was entitled to a lien for the sum of $445.43, and that said liens were all prior and superior to the rights of all other parties, including the lien of a trust deed securing a bond issue in the sum of $65,000. The decree ordered the sale of the real estate described in the amended and supplemental bill of complaint to satisfy the lien claims.

The bill was filed by the United Cork companies, an Illinois corporation, against Charles A. Volland, doing business as Chicago Lawn Pure Ice Company, et al., to foreclose a mechanic's lien for cork insulation furnished and installed by the complainant in the premises of the defendant Volland. Three intervening petitions were filed to foreclose mechanics' liens, one by Carl Westberg &

35266

UNITED CORK COMPANIES,
a corporation,

Appellee,

v.

CHARLES A. VOLLAND et al.,
Defendants.

BENJAMIN G. ALLEMTHICK, as
Successor Trustee, xxx HENRY
LANG, JR., and ERNEST . VOOT,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE SCHALLER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree finding that plaintiff, United Cork Companies, a corporation, was entitled to a lien for the sum of $3,422.22; that intervening petitioner Carl Ternberg & Company was entitled to a lien for the sum of $6,056.70; that Midwest Engineering & Equipment Company was entitled to a lien for the sum of $448.43, and that said liens were all prior and superior to the rights of all other parties, including the lien of a trust deed securing a bond issue in the sum of $25,000. The decree ordered the sale of the real estate described in the complaint and supplemental bill of complaint to satisfy the lien claims.

The bill was filed by the United Cork Companies, an Illinois corporation, against Charles A. Volland, doing business as Chicago Dawn Ice Company, et al., to foreclose a mechanic's lien for cork insulation furnished and installed by the complainant in the premises of the defendant Volland. Three intervening petitions were filed to foreclose mechanics' liens, one by Carl Ternberg &

Company, a corporation, assignee of Carl Westberg, doing business as Carl Westberg & Company; one by Midwest Engineering & Equipment Company, a corporation, and one by the Gifford Wood Company, a corporation, the last one subsequently dismissed. The case was referred to a master in chancery, who filed an original and an amended report. In both reports the master found that there was due to complainant, United Cork Companies, the sum of $3,498.22, together with interest thereon at the rate of five per cent per annum from July 8, 1930; that it is entitled to a lien, and that its lien is superior to the lien of the trust deed from Charles A. Volland and Hilda Volland, his wife, to the West Englewood Trust & Savings Bank, a corporation, as trustee, dated May 15, 1930; that there was due Carl Westberg & Company the amount claimed, that it is entitled to a mechanic's lien for the amount so due, and that its said lien is superior to the lien of said trust deed. The master found that Midwest Engineering & Equipment Company was not entitled to a lien, but the chancellor sustained its objections and exceptions to the report and entered a decree in its favor. Defendants concede that the allowance of the Midwest Engineering & Equipment Company's claim was justified. Defendants filed objections to the master's report as to the claim of United Cork Companies and as to the claim of Carl Westberg & Company. The objections, considered by the chancellor as exceptions to the report, were overruled and the master's report in respect to the two claims was approved.

On February 8, 1930, Charles A. Volland, doing business under the name and style of Chicago Lawn Pure Ice Company, owned the property described in the bill. He entered into a contract with Carl Westberg, doing business as Carl Westberg & Company, by the terms of which the latter agreed to furnish Volland certain labor and materials in the construction of certain buildings and appurtenances thereto on the premises in question for the sum of $33,578,

Company, a corporation, assignee of Carl Seatberg, doing business as Carl Seatberg & Company; one by Midwest Engineering & Equipment Company, a corporation, and one by the Gifford Wood Company, a corporation, the last one subsequently dismissed. The case was referred to a master in chancery, who filed an original and an amended report. In both reports the master found that there was due to complainant, United Cork Companies, the sum of $3,498.23, together with interest thereon at the rate of five per cent per annum from July 8, 1930; that it is entitled to a lien, and that its lien is superior to the lien of the trust deed from Charles A. Volland and Hilda Volland, his wife, to the First Indiana Trust & Savings Bank, a corporation, as trustee, dated May 1, 1930; that there was due Carl Seatberg & Company the amount claimed, that it is entitled to a mechanic's lien for the amount so due, and that its said lien is superior to the lien of said trust deed. The master found that Midwest Engineering & Equipment Company was not entitled to a lien, but the chancellor sustained its objections and exceptions to the report and entered a decree in its favor. Defendants concede that the allowance of the Midwest Engineering & Equipment Company's claim was justified. Defendants filed objections to the master's report as to the claim of United Cork Companies and as to the claim of Carl Seatberg & Company. The objections, considered by the chancellor on exceptions to the report, were overruled and the master's report in respect to the two claims was approved.

On February 8, 1930, Charles A. Volland, doing business under the name and style of Chicago Lawn Sure Lee Company, owned the property described in the bill. He entered into a contract with Carl Seatberg, doing business as Carl Seatberg & Company, by the terms of which the latter agreed to furnish certain labor and materials in the erection of certain buildings and appurtenances thereto on the premises in question for the sum of $33,370,

plus extras. Volland also made a contract with "United Cork Companies" to install corkboard insulation, refrigerator doors, etc., in the premises. On May 15, 1930, Volland and his wife executed and delivered to the West Englewood Trust and Savings Bank, a corporation, as trustee, a certain trust deed conveying the real estate described in the bill, to secure certain bonds, aggregating the sum of $65,000. That bank was subsequently closed by the state auditor and Benjamin G. Kilpatrick, one of the appellants, became successor in trust. Volland was declared a bankrupt and the premises and improvements were sold by the referee in bankruptcy to Henry Lang, Jr. and Fred W. Vogt, appellants.

As to the claim of complainant, United Cork Companies, an Illinois corporation: Complainant's amended and supplemental bill alleges that the United Cork Companies, an Illinois corporation, on January 22, 1930, submitted a written proposal to Charles A. Volland, doing business as Chicago Lawn Pure Ice Company, to furnish and install cork insulation and cold storage doors for a certain ice house being erected upon the premises. The amount called for by the contract was $9,700. Complainant alleges that it did extra and additional work of the value of $198.22 and that there was due it at the time of the filing of the bill $3,498.22 and interest. The mechanic's lien claim filed November 1, 1930, states that the United Cork Companies, an Illinois corporation, made the contract with Volland, doing business as Chicago Lawn Pure Ice Co. The evidence shows that there are two corporations, United Cork Companies, a New York corporation, which had its principal office in Lyndhurst, New Jersey, and United Cork Companies, an Illinois corporation, which had its principal office in Chicago, Illinois. Appellants contend that the contract upon which complainant relies is the contract of the New York corporation and that complainant had no right to sue upon the contract; that there is a material variance between the essential

plus extras. Volland also made a contract with "United Cork Companies" to install cork board insulation, refrigerator doors, etc., in the premises. On May 16, 1930, Volland and his wife executed and delivered to the West Englewood Trust and Savings Bank, a corporation, as trustee, a certain trust deed conveying the real estate described in the bill, to secure certain bonds, aggregating the sum of $65,000. That bank was subsequently closed by the state auditor and Benjamin G. Kilpatrick, one of the appellants, became successor in trust. Volland was declared a bankrupt and the premises and improvements were sold by the referee in bankruptcy to Henry Lang, Jr. and Fred T. Vogt, appellants.

As to the claim of complainant, United Cork Companies, an Illinois corporation: Complainant's amended and supplemental bill alleges that the United Cork Companies, an Illinois corporation, on January 22, 1930, submitted a written proposal to Charles A. Volland, doing business as Chicago Ice Pure Ice Company, to furnish and install cork insulation and cold storage doors for a certain ice house being erected upon the premises. The amount called for by the contract was $2,700. Complainant alleges that it did extra and additional work of the value of $138.22 and that there was due it at the time of the filing of the bill $3,698.22 and interest. The mechanic's lien claim filed November 1, 1930, states that the United Cork Companies, an Illinois corporation, made the contract with Volland, doing business as Chicago Ice Pure Ice Co. The evidence shows that there are two corporations, United Cork Companies, a New York corporation, which had its principal office in Syracuse, New Jersey, and United Cork Companies, an Illinois corporation, which had its principal office in Chicago, Illinois. Appellants contend that the contract upon which complainant relies is the contract of the New York corporation and that complainant had no right to sue upon the contract; that there is a material variance between the essential

allegations of the bill and the testimony, and that as no amendment was made to support the proof it was the duty of the chancellor to dismiss the bill.

The material parts of the contract read as follows:

"CHICAGO OFFICE
January 22nd, 1930.

"PROPOSAL
UNITED CORK COMPANIES, OF NEW YORK
Factory and Main Office
LYNDHURST, N. J.

"Subject ICE STORAGE AND ICE TANK

"TO:- The Chicago Lawn Pure Ice Co.,
Chicago, Ill.

"We propose to furnish all labor and materials required for the work specified below as follows:

"For furnishing and installing Crescent 100% pure corkboard insulation, Crescent Sealtite Mastic finish, refrigerator doors, granulated cork etc., required in the insulation of an ice storage room and ice tank to be located in the plant of the Chicago Lawn Pure Ice Company at 3600 W. 59th. Street, Chicago. * * *

Closed for $9700.00 EJW

"PRICE: Nine Thousand Nine Hundred Ninety Five ($9995.00) Dollars

" * * *

"This proposal is subject to conditions printed on the reverse side of this sheet. It is for prompt acceptance and does not constitute a contract until approved by a duly authorized officer of the United Cork Companies at its main office at Lyndhurst, N. J.

"Respectfully submitted,
UNITED CORK COMPANIES
BY George E. Carll

"Approved, Lyndhurst, N. J. Apr. 12, 1930
UNITED CORK COMPANIES
BY Edwin J. Ward,
Secy.

"Accepted April 12, 1930
Chicago Lawn Pure Ice Co.
By Chas. A. Volland,
Pres."

On October 16, 1933, Edward J. Ward, called as a witness by complainant, gave the following testimony upon cross-examination:

"Q. Your name is Edwin J. Ward? A. Edwin J. Ward, yes. Q. And what office do you hold with the United Cork Companies? A. Secretary. Q. The United Cork Companies have their offices in New York, is that

allegations of the bill and the testimony, and that no amendment was made to support the proof it was the duty of the chancellor to dismiss the bill.

The material parts of the contract read as follows:

"CHICAGO OFFICE
January 22nd, 1920.

"PROPOSAL
UNITED CORK COMPANIES, OF NEW YORK
Factory and Main Office
LYNBURST, N. J.

"Subject ICE STORAGE AND ICE TANK

"TO:- The Chicago Lawn Pure Ice Co.,
Chicago, Ill.

"We propose to furnish all labor and materials required for the work specified below as follows:

"For furnishing and installing Crescent 100% pure corkboard insulation, Crescent Sealite Mastic finish, refrigerator doors, gravitated cork etc., required in the insulation of an ice storage room and ice tank to be located in the plant of the Chicago Lawn Pure Ice Company at 3600 W. 39th Street, Chicago. * * *

Closed for $[illegible] CW

"PRICE: Nine Thousand Nine Hundred Ninety Five ($[illegible]) Dollars

* * *."

"This proposal is subject to conditions printed on the reverse side of this sheet. It is for prompt acceptance and does not constitute a contract until approved by a duly authorized officer of the United Cork Companies at its main office at Lyndhurst, N. J.

"Respectfully submitted,
UNITED CORK COMPANIES
BY George W. Cartl

"Approved, Lyndhurst, N. J. Apr. 12, 1920
UNITED CORK COMPANIES
BY Edwin L. Ford,
Mgr."

"Accepted April 13, 1920
Chicago Lawn Pure Ice Co.
By Chas. A. Volland,
Pres."

On October 1st, 1920, Edward J. Ward, called as a witness by complainant, gave the following testimony upon cross-examination:

"Q. Your name is Edwin J. Ward? A. Edwin J. Ward, Yes. Q. And what office do you hold with the United Cork Companies? A. Secretary. Q. The United Cork Companies have their offices in New York, is that

right? A. Chicago. We have an Illinois corporation and a New York corporation. Q. And a New York corporation? A. Yes, sir. Q. This proposal is United Cork Companies of New York, is that right, and that appears on complainant's exhibit No. 1? A. Yes, sir. Q. This proposal states that it must be authorized by the United Cork Companies at its main office, Lyndhurst, New Jersey, is that right? A. That is right. Q. Was this contract sent to the office of the United Cork Companies at Lyndhurst, New Jersey, for its approval? A. Yes, sir. Q. Are you the same Edwin J. Ward, secretary of the United Cork Companies from New York? A. Yes. Q. Where did you approve this contract? A. At Lyndhurst, New Jersey. Q. Is that where your offices are at, Lyndhurst, New Jersey? A. No,sir, that is where the United Cork Companies office of New York is, yes, sir. Q. Where do you live at? A. I live at Chicago. Q. There are two corporations, is that right? A. Yes, sir. Q. This proposal, complainant's exhibit 1, was signed by you in Lyndhurst, New Jersey, is that right? A. Yes, sir. Q. And was accepted by the United Cork Companies of New York, is that right? A. Yes, sir. Q. That is a New York corporation, is that right? A. It is, yes, sir. * * * In other words, the United Cork Companies of Illinois executed the contract for the United Cork Companies of New York. Q. Well, this one was executed in Lyndhurst, New Jersey? A. I am talking about the actual work, not the execution of it. Q. You mean the Illinois corporation does the work? A. Does the work, that is right. Q. But the United Cork Companies of New York have the contracts, is that right? A. Yes, sir, that is right. * * * Re-Direct Examination by Mr. Ryden (attorney for complainant): Q. Was this contract, complainant's exhibit 1, prepared in the Chicago office of the company? A. Yes, sir. Q. Mailed to the George B. Bright Company of Detroit, Michigan, or delivered? A. Mailed to George B. Bright Company

right? A. Chicago. We have an Illinois corporation and a New York corporation. Q. And a New York corporation? A. Yes, sir. Q. This proposal is United Dock Companies of New York, is that right, and that appears on complainant's exhibit 7? A. Yes, sir. Q. This proposal states that it must be authorized by the United Dock Companies - the main office, Jersey Street, New Jersey, is that right? A. That is right. Q. Was this contract sent to the office of the United Dock Companies at Lyndhurst, New Jersey, for its approval? A. Yes, sir. Q. Are you the same Edwin L. Ward, secretary of the United Dock Companies from New York? A. Yes. Q. Where did you approve this contract? A. At Lyndhurst, New Jersey. Q. Is that where your offices are at, Lyndhurst, New Jersey? A. No, sir, that is where the United Dock Companies office of New York is, yes, sir. Q. Where do you live at? A. I live at Chicago. Q. There are two corporations, is that right? A. Yes, sir. Q. This proposal, complainant's exhibit 7, was signed by you in Lyndhurst, New Jersey, is that right? A. Yes, sir. Q. And was accepted by the United Dock Companies of New York, is that right? A. Yes, sir. Q. That is New York corporation, is that right? A. It is, yes, sir. Q. [illegible] United Dock Companies of Illinois executed the contract for the United Dock Companies of New York. Q. Only, does one use executive in Lyndhurst, New Jersey? A. [illegible] executive [illegible] work, not the execution of it. Q. You mean the Illinois corporation does the work? A. Does the work. Q. [illegible] United Dock Companies of New York [illegible] Yes, sir, that is right. [illegible] (attorney for complainant): [illegible] exhibit 7, prepared in the Chicago office of the [illegible] sir. Q. Neither in the Jersey [illegible] Michigan, or Illinois? A. Neither in [illegible] company

of Detroit, Michigan. Q. And the business here is transacted by the United Cork Companies, an Illinois corporation? A. Yes, sir. Q. The acceptance by the New York corporation is for the materials to be furnished to the Illinois company, is that right? A. That is right, yes, sir." It was evident from the above testimony that complainant, under the allegations of the bill, could not maintain its claim for lien, and on November 10, the witness, recalled to the stand by complainant, made an effort to change the effect of his former testimony, but upon his recross-examination the following occurred: "Q. Do you remember that you testified that the work was executed by the Illinois corporation? A. Yes, sir, I do. Q. For the New York corporation? A. Yes, sir. Q. Is that correct? A. That is right. Q. You remember that you testified, you remember that you stated in other words that the Illinois corporation executed the contract for the United Cork Companies of New York; do you remember you made that statement? A. I do. Q. Is that statement correct? A. Literally, yes. Q. What? A. Literally, it is, yes. Q. Well, is that answer true that you made at the last hearing? A. It is, yes, sir. Q. I asked you then on that cross-examination: 'The Illinois corporation does the work?' And you answered, 'does the work, that is right.' Are you willing to stand by that question and answer? A. Yes. Q. 'But the United Cork Companies of New York have the contract, is that right?' And you said, 'That is right.' Is that right? * * * Q. I asked you this question: 'Q. You mean the Illinois Corporation does the work? A. Does the work, that is right.' You made that answer? A. Yes, sir, I did. Q. And I asked you this question: 'Q. But the United Cork Companies of New York have the contracts, is that right? A. Yes, sir, that is right.' You made that answer, did you? A. Yes, sir, I did. Q. Are you willing to stand by those answers that you made at the last hearing? Are they true? * * *

of Detroit, Michigan. Q. And the business here is transacted by the United Cork Companies, an Illinois corporation? A. Yes, sir. Q. The acceptance by the New York corporation is for the materials to be furnished to the Illinois company, is that right? A. That is right, yes, sir." It was evident from the above testimony that complainant, under the allegations of the bill, could not maintain its claim for libel, and on November 10, the witness, recalled to the stand by complainant, made an effort to change the effect of his former testimony, but upon his redirect-examination the following occurred: "Q. Do you remember that you testified that the work was executed by the Illinois corporation? A. Yes, sir, I do. Q. For the New York corporation? A. Yes, sir. Q. Is that correct? A. That is right. Q. You remember that you testified, you remember that you stated in our words that the Illinois corporation executed the contract for the United Cork Companies of New York; do you remember you made that statement? A. I do. Q. Is that statement correct? A. Literally, yes. Q. What? A. Literally, it is, yes. Q. Well, is that answer true that you made at the last hearing? A. It is, yes, sir. Q. I asked you then on that cross-examination: 'The Illinois corporation does the work?' And you answered, 'Does the work, that is right.' Are you willing to stand by that question and answer? A. Yes. Q. 'But the United Cork Companies of New York have the contract, is that right?' And you said, 'That is right.' Is that right? * * * Q. I asked you this question: 'Q. You mean the Illinois Corporation does the work? A. Does the work, that is right.' You made that answer? A. Yes, sir, I did. Q. And I asked you this question: 'Q. But the United Cork Companies of New York have the contract, is that right? A. Yes, sir, that is right.' You made that answer, did you? A. Yes, sir, I did. Q. Are you willing to stand by those answers that you made at the last hearing? Are they true? * * *

A. It was true in this respect: That the formal contract was taken by the New York office. Mr. Rosenberg: That is all." Ward stated during this last testimony that the New York corporation had made an assignment of the contract to the Illinois corporation, and the assignment, over the objection of defendants, was admitted in evidence. We are satisfied that we must sustain the contention of appellants that the contract upon which the lien is based was made by the United Cork Companies of New York, a New York corporation. The master found that Volland "entered into a contract with the complainant herein, United Cork Companies, a corporation." In other words, in spite of the material issue raised by defendants, he refused to make any specific finding upon the material question as to whether the contract was made by the New York corporation or the Illinois corporation. While defendants, in their objections to the master's report, pointed out, with particularity, the variance between the allegation in the bill and the proof, complainant made no effort to amend the bill. The fact that complainant considered it necessary to obtain an assignment from the New York corporation tends to weaken its claim that the Illinois corporation was, in fact, the real party to the contract. Although it was specifically pointed out to the master, at the time the testimony in reference to the assignment was taken, that the assignment had not been pleaded, the complainant made no effort to amend its pleadings in that regard. Complainant seeks to avoid the effect of appellants' instant contention by arguing that if the contract was the contract of the New York corporation defendants should have affirmatively pleaded that fact. Defendants did not, in their pleadings, admit that the contract was made with the Illinois corporation, and the burden of proving its case rested upon the complainant. It is a settled rule of law that the plaintiff cannot make one case by his allegations and recover on a

1. It was true in this respect: That the formal contract was taken by the New York office. Mr. Moenchberg: That is all." Yard stated during this last testimony that the New York corporation had made an assignment of the contract to the Illinois corporation, and the assignment, over the objection of defendants, was admitted in evidence. We are satisfied that we must sustain the contention of appellants that the contract upon which the lien is based was made by the United Dock Companies of New York, a New York corporation. The master found that Volland "entered into a contract with the complainant herein, United Dock Companies, a corporation." In other words, in spite of the material issue raised by defendants, he refused to make any specific finding upon the material question as to whether the contract was made by the New York corporation or the Illinois corporation. While defendants, in their objections to the master's report, pointed out, with particularity, the variance between the allegation in the bill as the proper legal inducement to filing to assert the bill. The fact that complainant contended it necessary to obtain an assignment from the New York corporation tends to weaken its claim that the Illinois corporation was, in fact, the real party to the contract. Although it was specifically pointed out to the master, at the time the testimony in reference to the assignment was taken, that the assignment had not been pleaded, the complainant made no effort to amend its pleadings in the court. Complainant seeks to avoid the effect of appellants' instant contention by argument that if the contract was the contract of the New York corporation defendants should have affirmatively pleaded that fact. Defendants did not, in their pleadings, admit that the contract was made with the Illinois corporation, and the burden of proving it was cast upon the complainant. It is a settled rule of law that the plaintiff cannot make one case by his allegations and recover on a

different case made in the proof. Aside from the question of variance, complainant failed to prove the essential allegation in the bill that it made the contract with Volland.

As to the claim of Carl Westberg & Company, a corporation: Appellants urge a number of grounds in support of their contention that the decree, in so far as it allowed the claim for a lien, should be reversed. One, at least, of the grounds urged has merit. Section 11 of the Mechanics' Liens act provides:

> "The bill or petition shall contain a brief statement of the contract or contracts on which it is founded, the date, when made, and when completed, if not completed, why, and it shall also set forth the amount due and unpaid, a description of the premises which are subject to the lien, and such other facts as may be necessary to a full understanding of the rights of the parties."

In Westberg's sworn statement of claim for lien, filed in the office of the clerk of the Circuit court of Cook county on February 25, 1931, he stated that he completed all work under the contract, including the extras, on December 31, 1930. Carl Westberg & Company, a corporation, defendant, filed its answer in the nature of an intervening petition, in which it alleged "that the furnishings of said material, labor and services was completed on December 31, 1930 and that on that day the provisions of said contract were, therefore completed." The evidence shows that Westberg did not complete his contract until April 3, 1931. Westberg so testified, the master so found, the decree so found, and counsel for Carl Westberg & Company concede, as they must, that Westberg did not complete the work under his contract until April 3, 1931. Appellants contend that the material variance between the allegations of the petition, the proof and the findings was properly raised by them, and that as no amendment to the intervening petition was made to support the proof the trial court should have dismissed the petition. The contention must be sustained. Our Supreme court has repeatedly stated that the Mechanics' Liens statute is in derogation of the common law and

different case made in the proof. Aside from the question of variance, complainant failed to prove the essential allegation in the bill that it made the contract with Veiland.

As to the claim of Carl Ruthberg & Company, a corporation: Appellants urge a number of grounds in support of their contention that the decree, in so far as it allowed the claim for a lien, should be reversed. One, at least, of the grounds urged has merit. Section 11 of the Mechanics' Lien act provides:

> "The bill or petition shall contain a brief statement of the contract or contracts on which it is founded, the date, when made, and when completed, if not completed, why, and it shall also set forth the amount due and unpaid, a description of the premises which are subject to the lien, and such other facts as may be necessary to a full understanding of the rights of the parties."

In Ruthberg's sworn statement of claim for lien, filed in the office of the clerk of the circuit court of Cook county on February 25, 1931, he stated that he completed all work under the contract, including the extras, on December 31, 1930. Carl Ruthberg & Company, a corporation, defendant, filed its answer in the nature of an intervening petition, in which it alleged that the furnishing of said material, labor and services was completed on December 31, 1930 and that on that day the provisions of said contract were, therefore completed." The evidence shows that Ruthberg did not complete his contract until April 3, 1931. Ruthberg so testified, the master so found, the decree so found, and counsel for Carl Ruthberg & Company concede, as they must, that Ruthberg did not complete the work under his contract until April 3, 1931. Appellants contend that the material variance between the allegations of the petition, the proof and the findings was properly raised by them, and that in so amendment to the intervening petition was made to conform the proof the trial court should have dismissed the petition. The contention must be sustained. Our supreme court has repeatedly stated that the Mechanics' Lien statute is in derogation of the common law and

must be strictly construed. Counsel for Carl Westberg & Company had ample notice of the variance and yet made no effort to amend the petition.

Other points are raised and strenuously argued by appellants in support of their general contention that Carl Westberg & Company should not have been allowed a lien, but we do not deem it necessary to pass upon them.

The decree of the Circuit court of Cook county, in so far as it awards liens to United Cork Companies, a corporation, and Carl Westberg & Company, a corporation, is reversed.

DECREE IN SO FAR AS IT AWARDS LIENS TO
UNITED CORK COMPANIES, A CORPORATION,
AND CARL WESTBERG & COMPANY, A CORPORATION,
IS REVERSED.

Sullivan and Friend, JJ., concur.

must be strictly construed. Counsel for Carl Gerberg & Company had ample notice of the variance and yet made no effort to meet the petition.

Other points are raised and strenuously argued by appellants in support of their general contention that Carl Gerberg & Company should not have been allowed a lien, but we do not deem it necessary to pass upon them.

The decree of the circuit court of Cook county, in so far as it awards liens to United Work Companies, a corporation, and Carl Gerberg & Company, a corporation, is reversed.

REVERSED IN PART, IT ALONE BEING TO
UNITED WORK COMPANIES, A CORPORATION,
AND CARL GERBERG & COMPANY, A CORPORATION,
IS REVERSED.

Sullivan and Friend, JJ., concur.

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38318

ALBINA CIRAN,
Appellee,

v.

STEPHEN KOREC et al.,
Defendants.

STEPHEN KOREC and MARY KOREC,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

284 I.A. 652

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A bill was filed to foreclose the lien of a trust deed securing three principal notes. The master to whom the cause was referred found that complainant, as the owner of notes A and B, had a first lien on the premises; that the defendants Stephen Korec and Mary Korec (appellants), as the owners of note C, had a lien on the premises "but subject and subordinate to the aforesaid lien of the complainant," and that the three notes were entitled to payment from the proceeds of the mortgage in the order of their maturity. Appellants have appealed from a decree approving the master's report.

On May 26, 1930, Steve Cerny and Alzbeta Cerny borrowed $3,200 from Papanek-Kovac State Bank of Chicago, and to evidence and secure the indebtedness they executed and delivered three notes, each dated May 26, 1930, as follows: Note A, for $500, payable two years after date; note B, for $500, payable three years after date, and note C, for $2,200, payable five years after date, all of the notes bearing interest at six per cent per annum, evidenced by coupons payable on November 26 and May 26 in each year. The interest

38818

ALBINA JIRIK,
Appellee,

v.

STEPHEN ROSKO et al.,
Defendants.

STEPHEN ROSKO and MARY
ROSKO,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

204 I.A. 652

MR. PRESIDING JUSTICE TOMLIN DELIVERED THE OPINION OF THE COURT.

A bill was filed to foreclose the lien of a trust deed securing three principal notes. The question to which the parties cite referred "court" that complainant, as the owner of notes A and B, had a first lien on the premises; that defendants, Stephen Rosko and Mary Rosko (appellants), as the owners of note C, had a lien on the premises "but subject and subordinate to the aforesaid lien of the complainant," and that the three notes were entitled to payment from the proceeds of the mortgage in the order of their maturity. Appellants have appealed from a decree adjudicating the validity of the complaint.

On May 20, 1925, Steve Jirik and Albina Jirik borrowed $3,200 from Spanek-Novak State Bank of Chicago, and to evidence and secure the indebtedness they executed and delivered three notes, each dated May 20, 1925, as follows: Note A, for $1,000, payable two years after date; note B, for $1,000, payable three years after date, and note C, for $1,200, payable five years after date, all of the notes bearing interest at six per cent per annum, evidenced by coupons payable on November 20 and May 20 of each year. The interest

on note A was evidenced by four interest coupons; note B, six interest coupons, and note C, ten interest coupons. To secure the notes Cerny and wife made and executed a trust deed to Martin Papanek, as trustee, conveying the real estate in question, which is the deed plaintiff asked to have foreclosed. It contained no provision as to any priority of lien of the different notes. The bank sold the notes in the following order: Note B, to Leo Chvojka, on May 26, 1930; note C, to appellants, on June 21, 1930, and note A, to J. Sporina, on July 1, 1930. At the time the bank sold note C to appellants it delivered the trust deed to them. On July 1, 1933, plaintiff bought note B from Leo Chvojka for $385, and on August 4, 1933, she bought note A from J. Sporina for $500. Note A has been in default since May 26, 1932. Note B has been in default since May 26, 1933. Interest coupon 4 on note B, in the sum of $15, has been in default from May 26, 1932, and interest coupon 6 upon the same note, in the sum of $15, has been in default since May 26, 1933. Interest coupon 5 on note C has been in default from November 26, 1932, and interest coupon 6 upon the same note has been in default since May 26, 1933.

Appellants state that there are no questions of fact presented by the appeal and that our decision must necessarily turn on certain questions of law.

Plaintiff, in her bill, alleged that the two notes owned by her were a prior lien upon the premises to the note owned and held by appellants. The master so found. The decree of the chancellor finds "that the notes in the case at bar in the absence of any special provision to the contrary, are entitled to payment from the proceeds of the mortgaged property in the order of their maturity. The court further finds that there is no special provision to the contrary in the trust deed here in question and for that reason finds that the said notes secured by said trust deed are entitled to payment from the proceeds of the mortgage in the order of their maturity."

on note A was evidenced by four interest coupons, note B, six interest coupons, and note C, ten interest coupons. To secure the notes Mary and wife made and executed a trust deed to Martin Papenek, as trustee, conveying the real estate in question, which is the deed plaintiff asked to have foreclosed. It contained no provision as to any priority of lien of the different notes. The bank held the notes in the following order: Note B, to Leo Cwojika, on May 26, 1930; note C, to appellants, on June 23, 1930, and note A, to J. Sporina, on July 1, 1930. At the time the bank sold note C to appellants it delivered the trust deed to them. On July 1, 1932, plaintiff bought note B from Leo Cwojika for $250, and on August 4, 1932, she bought note A from J. Sporina for $500. Note A has been in default since May 26, 1932. Note B has been in default since May 26, 1932. Interest coupon 4 on note B, in the sum of $15, has been in default from May 26, 1932, and interest coupon 6 upon the same note, in the sum of $15, has been in default since May 26, 1933. Interest coupon 3 on note C has been in default from November 26, 1932, and interest coupon 6 upon the same note has been in default since May 26, 1933.

Appellants state that there are no questions of fact presented by the appeal and that our decision must necessarily turn on certain questions of law.

Plaintiff, in her bill, alleged that the notes owned by her were a prior lien upon the premises to the notes owned and held by appellants. The master so found. The decree of the chancellor finds "that the notes in the case at bar in the absence of any special provision to the contrary, are entitled to payment from the proceeds of the mortgaged property in the order of their maturity. The court further finds that there is no special provision to the contrary in the trust deed here in question and for that reason finds that the said notes secured by said trust deed are entitled to payment from the proceeds of the mortgage in the order of their maturity."

Appellants contend that "all the notes, irrespective of maturity, are of equal lien." The able counsel for appellants concedes that there are decisions in this state "which seem to support" the rule followed by the master and the chancellor, but argues that the rule is founded upon dictum in two early cases (Sargent v. Howe, 21 Ill. 148, and Vansant v. Allmon, 23 Ill. 26) and that even if the rule must be considered as established law it is not applicable to the facts of the instant case. As we read the Illinois decisions that bear upon the instant contention it is the settled law of this state that where several notes, payable at different dates, are secured by the same mortgage or trust deed, such notes, in the absence of any special provision in the mortgage or trust deed to the contrary, are entitled to payment from the proceeds of the mortgaged property in the order of their maturity. (See Sargent v. Howe, supra; Vansant v. Allmon, supra; Funk v. McReynolds, 33 Ill. 482; Gardner v. Diederichs, 41 Ill. 158; Koester v. Burke, 81 Ill. 436; Schultz v. Plankinton Bank, 141 Ill. 116; The People v. Mitchell, 223 Ill. App. 8; Kuppenheimer v. Chicago Title and Trust Co., 163 Ill. App. 127; In re Estate of Lalla, 281 Ill. App. 124.) We cannot agree with counsel that this rule is the result of dictum in the opinions of the first two cases cited, nor can we agree with the further contention that if the rule prevails it is not applicable here because of an essential difference in the facts.

Appellants further contend that "even if the rule be that the lien of the notes is in the order of their maturity, nevertheless, the defendants, having acquired their notes from the common owner, while the common owner still retained one of plaintiff's notes, defendants' lien would come ahead of said note so retained." In connection with this contention appellants call our attention to the fact that at the time the bank sold note C to appellants, on

Appellants contend that "all the notes, irrespective of maturity, are of equal lien." The able counsel for appellants concedes that there are decisions in this state "which seem to support" the rule followed by the master and the chancellor, but argues that the rule is founded upon dicta in two early cases (Barnum v. Hope, 21 Ill. 148, and Vennum v. Allmon, 25 Ill. 26) and that even if the rule must be considered as established law it is not applicable to the facts of the instant case. As we read the Illinois decisions that bear upon the instant contention it is the settled law of this state that where several notes, payable at different dates, are secured by the same mortgage or trust deed, such notes, in the absence of any special provision in the mortgage or trust deed to the contrary, are entitled to payment from the proceeds of the mortgaged property in the order of their maturity. (See Sargent v. Hope, supra; Vennum v. Allmon, supra; Funk v. McReynolds, 88 Ill. 462; Gardner v. Ogdensburg, 61 Ill. 156; Koester v. Burke, 81 Ill. 436; Sabin v. Washington Bank, 141 Ill. 116; The People v. Mitchell, 223 Ill. 228, 8; Summerhayes v. Chicago Title and Trust Co., 160 Ill. 199, 197; In re Estate of Wells, 281 Ill. App. 124.) We cannot agree with counsel that this rule is the result of dicta in the opinions of the first two cases cited, nor can we agree with the further contention that if the rule prevails it is not applicable here because of an essential difference in the facts.

Appellants further contend that "even if the rule be that the lien of the notes is in the order of their maturity, nevertheless, the defendants, having acquired their notes from the common owner, while the common owner still retained one of plaintiff's notes, defendants' lien would come ahead of said note so retained." In connection with this contention appellants call our attention to the fact that at the time the bank sold note C to appellants, on

June 21, 1930, it still retained note A, and that therefore note A was subordinate to note C. In support of this contention appellants cite Kuppenheimer v. Chicago Title and Trust Co., supra, and Peoples National Bank of Monmouth v. Johnson, 271 Ill. App. 507. The decisions in both of these cases are based upon the rule that

"* * * When the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature. * * * The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in sharing the insufficient proceeds." (Pomeroy's Eq. Jur., Vol. 3 (4th ed.), sec. 1203.)

But in the instant case all of the notes secured by the trust deed were sold and transferred by the mortgagee, and this is a contest between the assignees of the various notes. The rule governing the facts in the instant case is that the holder of the note which first becomes due is entitled to be satisfied out of the proceeds in full, and then the others in their order, and this rule is not affected by priority of assignment of one of the younger notes. (See Black on Mortgages & Deeds of Trust, sec. 188; 3 Jones on Mortgages (8th ed.) sec. 2187 (1699); Funk v. McReynolds, supra; Doss v. Ditmars, 70 Ind. 451.) Appellants also cite Walker v. Dement, 42 Ill. 272, as an authority that the rule they contend for is the rule as between the first assignee and the second assignee. In that case the Supreme court said (276):

"There has been much discussion, where several notes falling due at different times are secured by a mortgage, whether the mortgageecan legally stipulate, with an assignee of a part, that he shall have a preferred lien on the security, over the assignees of the other notes. It now seems to be settled that he may, and such a stipulation will be binding as between the parties and all persons having notice. It is a matter of contract, lawful in itself, contravening no principle of law or public policy. Langdon v. Kieth, 9 Vermont, 229; McNay v. Bloodgood, 9 Porter (Ala.) 547; Ewing v. Arthur, 1 Humphrey (Tenn.) 537; Bryant v. Damon, 6 Gray (Mass.) 567; Bank of England v. Tarlton, 23 Mississippi, 173; Trustees of Jefferson College v. Prentiss, 29 id. 50; Moore v. Ware, 39 Maine, 498; Van Rensselear v. Stafford, 1 Hopkins Ch. (N. Y.) 569; Hilliard on Mortgages, 175, 176.

"If there be no contract, the rule would be as declared in

June 21, 1950, it still retained note A, and that therefore note A was subordinate to note B. In support of this construction appellants cite Guggenheimer v. Chicago Title and Trust Co., supra, and Peoples National Bank of Kewaunee v. Johnson, 171 Ill. App. 307. The decisions in both of these cases are based upon the rule that

"* * * when the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature. * * * The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in enforcing the insufficient proceeds." (Pomeroy's Eq. Jur., Vol. 3 (4th ed.), sec. 1203.)

But in the instant case all of the notes secured by the trust deed were sold and transferred by the mortgagee, and this is a contest between the assignees of the various notes. The rule governing the facts in the instant case is that the holder of the note which first becomes due is entitled to be satisfied out of the proceeds in full, and then the others in their order, and this rule is not affected by priority of maturity of one of the younger notes. (See Black on Mortgages & Deeds of Trust, sec. 1831; 3 Jones on Mortgages (8th ed.) sec. 2187 (1889); Tuck v. Mortgright, Warren Co. v. Stewart, 70 Ind. 451.) Appellants also cite Parker v. Kent, 43 Ill. 77, as an authority that the rule they contend for is the rule as between the first assignee and the second assignee. In that case the supreme court said (77):

"There has been much discussion, there seems to exist a conflict due at different times and in regard to a mortgage. Neither the mortgagee can legally assignate, with an assignee or a part, and shall have a preference lien on the property, over the assignees of the other notes. It may seem to be settled that he may, and such a stipulation will be binding as between the mortgagee and the person having notice. It is a matter of concern, legal in itself, concerning no principle of law or public policy. Jackson v. Ludeling, 21 Texas, 290; Kenny v. Hildebrand, 9 Porter (Ala.) 567; Kline v. Ayhurt, 1 Humphrey (Tenn.) 557; Bryant v. Isham, 17 John. (N.Y.) 252; Bank of England v. Anderson, 3 Bingham, 172; Trustees of Middlebury College v. Chandler, 16 Ill. 80; Young v. Miles, 32 Ill. 354; Van Hoesen v. Van Gaasbeek, 2 Johns Ch. (N. Y.) 250; Hilliard on Mortgages, 172, 176.

If there be no contract, the rule would be as Chief Justice

Sargeant v. How, 21 Ill. 148, and Vansant v. Allmon, 23 id. 34." (Italics ours.)

In the instant case the record is silent as to the intent of the mortgagee concerning priorities at the time the notes were assigned. Appellants state in their brief: "It is not based on any alleged intention of the mortgager at the time the mortgage was made. As to this, the record is silent. It is not based on any alleged intention of the mortgagee at the time the notes were assigned. The record is silent here - whatever the intention, it would indicate a preference to go to the Korecs because the trust deed was given to them, they held it and produced it at the hearing." In Sargent v. Howe, supra, the court said (149):

> "It is the well established doctrine, that the debt is the principal thing, and that a mortgage or pledge to secure its payment is only an incident; and that the assignment of the debt, also passes the mortgage or pledge without being referred to in the assignment. The mortgage or pledge being only an incident of the debt, and annexed to it, passes with it. And the assignee of the debt, takes the security by the assignment, in the same condition, and to the extent it was held by the payee." (See also Vansant v. Allmon, supra.)

We agree with plaintiff that when appellants received the trust deed from the bank their lien under the trust deed was subject to the lien of the two prior maturing notes.

Appellants contend that "even if the lien be in the order of maturity, and defendants be given no preference on account of the order of assignment, defendants would still have an equal or prior lien with plaintiff as to certain interest notes that matured before or at the same time that plaintiff's notes matured." This contention seems to be a meritorious one. Indeed, the only way in which plaintiff attempts to avoid the effect of the contention is by raising a further contention that defendants failed to file an objection before the master pointing out that the master failed to find that certain of defendants' interest coupons have priority and that therefore the objection to the action of the master was waived, and the error, if there be one, is not subject to review. The position of plaintiff is without merit. The master in his report stated all the facts

Bergquist v. Hoe, 21 Ill. 149, and Vanscoy v. Allison, 25 Ill. 54." (Italics ours.)

In the instant case the record is silent as to the intent of the mortgagee concerning priorities at the time the notes were assigned. Appellants state in their brief: "It is not based on any alleged intention of the mortgagee at the time the mortgage was made. As to this, the record is silent. It is not based on any alleged intention of the mortgagee at the time the notes were assigned. The record is silent here - whatever the intention, it would indicate a preference to go to the screen because the first lien was given to them, they held it and produced it at the hearing." In Bergquist v. Hoe, supra, the court said (149):

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We agree with plaintiff that when appellants received the trust deed from the bank their lien under the trust deed was subject to the lien of the two prior mortgaging notes.

Appellants contend that even if the lien be in the order of maturity, and not as they given no preference on account of the order of assignment, defendants could still have an equal or prior lien with plaintiff as to certain interest notes that matured before or at the same time that plaintiff's notes matured." This contention seems to be a meritorious one. Indeed, the only way in which plaintiff attempts to avoid the effect of the contention is by making a further contention that defendants failed to file an objection before the master pointing out that the master failed to find that certain of defendants' interest coupons have priority and therefore the objection to the action of the master was waived, and the error, if there be one, is not subject to review. The position of plaintiff is without merit. The master in his report stated all the facts

correctly but he was mistaken as to the legal consequence of the facts, and under such a state of the record it is not necessary for the party dissatisfied with the findings to except to the report. Exceptions to the legal conclusions of a master are neither necessary nor proper. Many cases might be cited in support of this well established rule.

The decree is erroneous in that it does not allow the interest notes held by appellants the priority to which they are entitled on account of the dates of their maturity. In all other respects the decree is affirmed.

The decree of the Superior court of Cook county is affirmed in part and reversed in part, and the cause is remanded with directions to the chancellor to modify the decree in accordance with the views expressed in this opinion.

DECREE AFFIRMED IN PART AND
REVERSED IN PART, AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

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The decree is erroneous in that it does not allow the interest notes held by appellees who the priority to which they are entitled on account of the date of their maturity. In all other respects the decree is affirmed.

The decree of the superior court of Cook county is affirmed in part and reversed in part, and the cause is remanded with directions to the chancellor to modify the decree in accordance with the views expressed in this opinion.

DECREE AFFIRMED IN PART AND REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

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38365

MARY COHEN,
Appellee,

v.

ABE TOPPER and LOUIS COHEN,
Defendants.

ABE TOPPER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 652[3]

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Abe Topper and Louis Cohen in an action of trespass on the case on promises for $3,000. In a trial by the court and a jury there was a verdict returned finding the issues against defendants and assessing plaintiff's damages against defendant Topper at the sum of $942.52, and against defendant Cohen at the sum of $1,744.79. Thereupon, upon motion of plaintiff, the trial court entered a judgment non obstante veredicto against defendant Topper for $1,664.58 and against defendant Cohen for $2,246.85. Defendant Topper appeals.

The material facts are not disputed. Cohen and Topper had been copartners for many years and upon the dissolution of the partnership there was due to plaintiff, the wife of Cohen, for moneys she had loaned to the partnership, $7,500. By agreement plaintiff was given certain notes, executed by customers of the partnership, to be held by her as collateral security for the payment of the $7,500. It was further agreed that all moneys collected upon these notes should be applied on account of the $7,500 indebtedness; that "they (the partners) will each be severally liable to the said Mary Cohen for one-half of the

38303

MARY COHEN,
Appellee,

v.

ABE TOPPER and LOUIS COHEN,
Defendants.

ABE TOPPER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF DADE CO.

284 I.A. 652

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Abe Topper and Louis Cohen in an action of trespass on the case on promises for $3,000. In a trial by the court and a jury there was a verdict returned finding the issues against defendants and assessing plaintiff's damages against defendant Topper at the sum of $944.32, and against defendant Cohen at the sum of $1,744.76. Thereupon, upon motion of plaintiff, the trial court entered a judgment non obstante veredicto against defendant Topper for $1,664.68 and against defendant Cohen for $3,244.32. Defendant Topper appeals.

The material facts are not disputed. Cohen and Topper had been copartners for many years and upon the dissolution of the partnership there was due to plaintiff, the wife of Cohen, for moneys she had loaned to the partnership, $7,300. By agreement plaintiff was given certain notes, secured by collateral of the partnership, to be held by her as collateral security for the payment of the $7,300. It was further agreed that all moneys collected upon those notes should be applied on account of the $7,300 indebtedness; that "they (the partners) will each be severally liable to the said Mary Cohen for one-half of the

difference between the amount collected by her on account of the said notes and the sum of $7,500." Among the notes were five for $500 each that had been given to the partnership by Sugarman Fur Company, Inc. Before the case went to the jury the only item of credit about which there was any dispute related to what is called the Sugarman transaction. On January 26, 1932, Sugarman Fur Company, Inc., being indebted to the partnership, delivered to it certain fur skins and fur coats, and it was agreed between the partners that Cohen should sell the merchandise and apply the proceeds on account of the $7,500 indebtedness. Over a period of nearly two years Cohen sold this merchandise and with the proceeds paid plaintiff $1,147.46, one-half of which amount she credited to defendant Topper and the other half she credited to defendant Cohen. It is not claimed that she did not give full credit to defendants for the $1,147.46 she received, but the sole defense interposed by defendant Topper in the trial court was that there was actual fraud committed by defendant Cohen in the sale of the Sugarman merchandise, defendant Topper contending that that merchandise would have realized, if there had been an honest sale, the sum of $5,822, which would have entitled him to a credit of $2,911. Defendant Topper concedes that he failed to produce any evidence to sustain his claim of fraud, and he is not complaining as to the amount fixed by the jury. He is now attempting to adopt a new theory in reference to the sale of the furs. Having tried his case below on the sole theory that actual fraud was committed by defendant Cohen in the sale of the Sugarman merchandise, he will not be heard to argue his appeal upon another and different theory. We may say, however, that there is nothing in the record to support defendant Topper's position in the trial court that there was fraud in the matter of the said sale. Defendant's theory of fraud was completely eliminated when, during the examination of defendant

difference between the amount collected by her on account of the said notes and the sum of $7,500." Among the notes were five for $500 each that had been given to the partnership by Ingersoll Fur Company, Inc. Before the case went to the jury the only item of credit about which there was any dispute related to what is called the Ingersoll transaction. On January 26, 1932, Ingersoll Fur Company, Inc., being indebted to the partnership, delivered to it certain fur skins and furs, and it was agreed between the partners that Cohen should sell the merchandise and apply the proceeds on account of the $7,500 indebtedness. Over a period of nearly two years Cohen sold this merchandise and with the proceeds paid plaintiff $1,167.50, one-half of which amount she credited to defendant Copper and the other half she credited to defendant Cohen. It is not claimed that she did not give full credit to defendants for the $1,167.50 she received, but the sole defense interposed by defendant Copper in the trial court was that there was actual fraud committed by her and Cohen in the sale of the Ingersoll merchandise; defendant Copper contended that that merchandise would have realized [illegible] been a [illegible] the sum of $3,382, which would have entitled him to a credit of $2,011. Defendant Copper contended that he failed to recover by evidence to sustain his claim of fraud, and he is not complaining as to the amount fixed by the jury. He is now attempting to adopt a new theory in reference to the sale of the furs. He tried his case solely on the sole theory that when I Ingersoll was entitled by defendant Cohen in the sale of the Ingersoll merchandise, he will not be heard to argue his appeal upon another and different theory. He may say, however, that he is nothing in the record to support defendant Copper's position in the trial court that there was fraud in the matter of the said sale. Defendant's theory of fraud was completely eliminated when, during the examination of defendant

Topper, his counsel made the admission to the court that defendant Cohen was an honest man.

There is not the slightest merit in this appeal. Under the evidence the trial court was obliged to sustain the motion of plaintiff for judgment in her favor non obstante veredicto.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

Topper, his counsel made the admission to the court that defendant Cohen was an honest man.

There is not the slightest merit in this appeal. Under the evidence the trial court was obliged to sustain the motion of plaintiff for judgment in her favor non obstante veredicto.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

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38484

THE TOBRY FURNITURE COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
FANCHON L. TROEGER, Appellee.	284 I.A. 652[4]

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A replevin action. In a trial by the court there was a finding that the right of property was in defendant, and judgment was entered that defendant have and recover from plaintiff the possession of the property involved, that a writ of retorno habendo issue for its return and that defendant recover from plaintiff the costs expended. Plaintiff appeals. Defendant has not filed a brief in this court.

The affidavit for replevin avers that plaintiff was the owner and lawfully entitled to the possession of one sofa and one chair; that said goods and chattels were of the value of $200 and that on March 26, 1935, defendant "wrongfully took, and now wrongfully detains said goods" from plaintiff. The bailiff replevied the chattels and delivered the same to plaintiff.

Plaintiff claims that it sold and delivered to defendant, on the terms and conditions stated in a written contract between the parties, the furniture, for the price of $283, payable $150 on the signing of the contract and $66.50 on the 18th day of every month thereafter until the entire price shall have been paid; that defendant paid the $150 but defaulted in paying the subsequent instalments; that plaintiff demanded possession of the furniture and defendant refused to deliver possession of the same; that,

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THE TOWER-UNITURES COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
TAMORON L. TROUT, Appellee.	

2 64 I.A. 652

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A replevin action. In a trial by the court there was a finding that the right of property was in defendant, and judgment was entered that defendant have and recover from plaintiff the possession of the property involved, that a writ of retorno habendo issue for its return and that defendant recover from plaintiff the costs expended. Plaintiff appeals. Defendant has not filed a brief in this court.

The affidavit for replevin avers that plaintiff was the owner and lawfully entitled to the possession of one sofa and one chair; that said goods and chattels were of the value of $300 and that on March 20, 1930, defendant "wrongfully took, and now wrongfully detains said goods" from plaintiff. The bailiff replevied the chattels and delivered the same to plaintiff.

Plaintiff claims that it sold and delivered to defendant, on the terms and conditions stated in a written contract between the parties, the furniture, for the price of $283, payable $50 on the signing of the contract and $60.00 on the 15th day of every month thereafter until the entire price shall have been paid; that defendant paid the $50 but refused to pay the subsequent instalments; that plaintiff demanded possession of the furniture and defendant refused to deliver possession of the same; that,

therefore, plaintiff "had the right to maintain this replevin suit, filed April 15, 1935, by virtue of the provisions of the written contract aforesaid, whereby (1) the title to said property remained vested in the plaintiff until the entire purchase price is paid, (2) upon the default of the defendant in the payment of any installment, the entire price at that time remaining due and unpaid shall, at the plaintiff's option, without notice, become immediately due and payable, (3) upon default by defendant in the payment of any installment of the price, the plaintiff may, without notice, take possession of said personal property, as its own individual and sole property, free and clear of any claim by defendant, and retain any and all payments made as liquidated damages for the use by defendant and for depreciation and for expense to plaintiff of taking possession of said personal property."

Defendant testified that she purchased furniture from samples exhibited to her by plaintiff and that plaintiff agreed that the furniture delivered to her would be identical with the samples shown her; that she told the salesman not to deliver the furniture until she had first seen it at plaintiff's store; that late one Saturday night plaintiff's deliveryman delivered at her home certain furniture; that when it was unwrapped she saw at once that the davenport delivered was not the kind that she had bought, that it did not match the sample shown her; that she told the deliveryman to take the davenport back to the plaintiff, but that he said: "This is Saturday night. We can't take it back to the Tobey place anway. * * * Call them up Monday morning. There is nothing for you to worry about. They will make it right." Defendant exhibited photographs of the furniture delivered to her to corroborate her claim that plaintiff did not deliver the kind of davenport it sold her and that the one delivered was of an inferior kind and defective.

therefore, plaintiff had the right to maintain this replevin suit, filed April 14, 1955, by virtue of the provisions of the written contract aforesaid, whereby (1) the title to said property remained vested in the plaintiff until the entire purchase price is paid, (2) upon the default of the defendant in the payment of any installment, the entire price at that time remaining due and unpaid shall, at the plaintiff's option, without notice, become immediately due and payable, (3) upon default by defendant in the payment of any installment of the price, the plaintiff may, without notice, take possession of said personal property, as the sole property, free and clear of any claim by defendant, and retain any and all payments made as liquidated damages for the use by defendant and for depreciation and for expenses to plaintiff of taking possession of said personal property."

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Plaintiff took the davenport back and subsequently returned one different from the one defendant had bought and that was inferior to the one that was first delivered to her. She offered to pay said balance if plaintiff would deliver to her the davenport she had purchased. Several witnesses testified in corroboration of her testimony as to the davenport that was delivered to her. Defendant was also corroborated as to what took place at the time of the sale. Plaintiff concedes that the furniture was sold by sample and the testimony of the salesman as to what occurred at the time of the sale does not tend to materially rebut defendant's testimony in that regard. Plaintiff's evidence also tends to show that the davenport delivered was defective and that it was not entirely like the sample shown defendant at the time of the sale.

Plaintiff contends that "the preponderance of the evidence shows that plaintiff delivered the property purchased." The able and experienced trial judge found that plaintiff did not deliver to defendant the kind of furniture that she purchased, and after an examination of the entire evidence bearing upon that controverted question we find ourselves in accord with the finding.

Plaintiff contends that it "is entitled to maintain replevin without returning or tendering the amount paid in by the defendant." From an examination of the "report of proceedings" it appears that both sides tried the case upon the theory that the sole issue was, Did plaintiff deliver to defendant the furniture she purchased? Defendant was allowed to introduce evidence, without objection, to support her theory of fact, and plaintiff introduced evidence in rebuttal of the same. The report shows that when the court decided the issue of fact against plaintiff the instant contention had not been raised nor suggested, and the trial court, when it made its finding, would have been fully justified, because of the way in which the case was tried, in entering a judgment for defendant.

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He based his decision, however, upon the ground that plaintiff, the seller, was in default because it had not delivered to defendant the property she bought and that therefore plaintiff had not the right to maintain replevin for the property "without first returning or offering to return the amount received on the contract." In support of its ruling the trial court cited 55 C. J. p. 1292, sec. 1323; Gennelle v. Boulais, 48 Wash. 310, and Estrich on Partial Payment Contracts, p. 751, sec. 377. We are in accord with the court's ruling. In addition to the aforesaid authorities we add Hamilton v. Singer Mfg. Co., 54 Ill. 370, wherein the court held that where a sewing machine was sold and delivered to the purchaser, a part of the price being paid in hand and the balance to be paid in installments, the vendor cannot maintain replevin for the machine, upon the refusal of the purchaser to make further payment on the ground the machine was not such as he had contracted for, without refunding the money already paid; Knight Light Co. v. Morrison, 203 Ill. App. 508, wherein the court held that where a party contracted to purchase goods of a specified kind and quality and the goods when delivered were found to be not of such kind or quality, such party would not be in default in refusing to pay for same, and replevin would not lie by the seller of the goods without his first returning to such party what he had paid thereon. The Supreme court denied a certiorari in that case. (See 206 Ill. App. xxiii. See also Singer Mfg. Co. v. Treadway, 4 Ill. App. 57, 59-60; American Soda Fountain Co. v. Dean Drug Co., 136 Iowa 312; Latham v. Davis, 44 Fed. 862.)

After the trial court had decided the case plaintiff cited Fairbanks v. Malloy, 16 Ill. App. 277, whereupon the court stated that that case was distinguishable from the instant one. It is. There the decision turned upon the question as to whether or not in the replevin action the defendant had the right to have determined the question of an alleged breach of warranty. The machinery in

He based his decision, however, upon the ground that plaintiff, the seller, was in default because it had not delivered to defendant the property she bought and that therefore plaintiff had not the right to maintain replevin for the property "without first returning or offering to return the amount received on the contract." In support of its ruling the trial court cited 55 C. J. p. 1292, sec. 1323; Gannella v. Koulais, 43 Wash. 310, and Matrion on Partial Payment Contracts, p. 731, sec. 377. We are in accord with the court's ruling. In addition to the aforesaid authorities we cite Hamilton v. Singer Mfg. Co., 54 Ill. 379, wherein the court held that where a sewing machine was sold and delivered to the purchaser, a part of the price being paid in hand and the balance to be paid in instalments, the vendor cannot maintain replevin for the machine, upon the refusal of the purchaser to make further payment on the ground the machine was not such as he had contracted for, without returning the money already paid; Knight Light Co. v. Jorrison, 202 Ill. 302, wherein the court held that where a party contracted to purchase goods of a specified kind and on life and the goods when delivered were found to be not of such kind or quality, such party would not be in default in refusing to pay for same, and replevin would not lie by the seller of the goods without his first returning to such party what he had paid thereon. The supreme court denied a certiorari in that case. (See 202 Ill. 302, xxiii. See also Singer Mfg. Co. v. Freedman, 4 Ill. App. 37, 38-40; American Soda Fountain Co. v. Jaeger Bros. Co., 102 Iowa 243; McMahon v. Davis, 44 Ga. 222.)

After the trial court had ruled the case plaintiff cited Fairbanks v. Kelly, 14 Ill. App. 377, whereupon the court stated that case was distinguishable from the instant one. In it. There the decision turned upon the question as to whether or not in the replevin action the defendant had the right to have determined the question of an alleged breach of warranty. The machinery in

question was accepted by the defendant and was used by him until it was replevied. As the court stated in its opinion (280):

> "It appeared also that when the plaintiffs demanded the property the defendant had moved it to another place, was using it for another purpose, and that it had deteriorated in value more than the amount paid on the purchase money."

In this court plaintiff also cites in support of its position Hartman Furniture & Carpet Co. v. Mowschine, 245 Ill. App. 626. The very short opinion in that case would seem to support defendant's instant contention, but the only case cited in support of the court's ruling is Fairbanks v. Malloy, supra.

Plaintiff admits, as it must, that to sustain its right to possession of the furniture it must prove (inter alia) that it delivered to defendant the furniture purchased. The defense in the instant case was not offered for the purpose of set-off or counterclaim for damages against plaintiff, but as a defense to plaintiff's right to a judgment for possession. Defendant's position was that she was not in default for refusing to pay the instalments, for the reason that plaintiff had not delivered the furniture purchased; that plaintiff was the party in default, and that until it returned to her the money it received from her on account of specific furniture purchased, or carried out its contract, it had no right, under the contract, to possession of the property. To sustain plaintiff's position would be to permit it to retain the money received and to recover possession of the property, or, in other words, to take advantage of its own wrong. If plaintiff is correct in its theory of the law, it might have delivered to defendant a worthless davenport, or one of little value, and then, in the instant proceeding based upon the contract, retain the money paid and obtain possession of the davenport delivered.

Plaintiff contends that "damages arising from the breach of the seller's warranty cannot be asserted in defense of the action of replevin by set-off, counterclaim or recoupment." It is a

question was accepted by the defendant and was used by him until it was replevied. As the court stated in its opinion (220):

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In this court plaintiff also cites in support of its position Hartman Furniture & Carpet Co. v. Hawkins, 245 Ill. pp. 224. The very short opinion in that case would seem to support defendant's instant contention, but the only case cited in support of the court's ruling is Fairbanks v. Bailey, supra.

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Plaintiff contends that "damages arising from the breach of the seller's warranty cannot be asserted in defense of the action of replevin by set-off, counterclaim or recoupment." It is a

sufficient answer to this contention to say that no such defense was asserted by defendant, nor was the decision of the trial court predicated upon any such theory of law. It will be noted that this case was tried just prior to the amendment to the Replevin Act, par. 21, sec. 21a, and, therefore, the new Civil Practice Act does not apply to this appeal.

In conclusion we may say that the trial court offered to enter an alternative judgment, that the writ of retorno habendo should issue unless in five days plaintiff paid back to defendant the $150, but plaintiff rejected the offer.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, JJ., concur.

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In conclusion we may say that the trial court offered to enter an alternative judgment, that the writ of replevin should issue unless in five days plaintiff paid back to defendant the $150, but plaintiff rejected the offer.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan and Friend, J.J., concur.

674

38301

MAXWELL HERZOG,
Appellant,

v.

CHICAGO TITLE & TRUST
COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

284 I.A. 653

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort in the municipal court against the Chicago Title & Trust Company, as trustee of 25 East Delaware Building Corporation, to recover $500 and accrued interest on one of a series of bonds evidencing a mortgage indebtedness of $1,200,000. The court entered a finding in favor of defendant, from which plaintiff appeals.

The suit is predicated upon the theory that defendant as trustee permitted the property to be sold at the foreclosure sale for an inadequate amount, in violation of its trust, to the detriment of plaintiff, a nondepositing bondholder. The essential facts disclose that in June, 1930, Chicago Title & Trust Company was designated as trustee in an indenture securing bonds aggregating $1,200,000 executed by the 25 East Delaware Building Corporation. The right to foreclose under the trust deed was vested solely in the trustee. The trust instrument provided that the trustee may bid for and purchase the mortgaged property without the production of any bonds or coupons or proof of ownership thereof. Subsequent to the filing of the foreclosure suit by the trustee, a reorganization plan was formulated by a bondholders' protective committee, accepted by 92% of the bondholders and approved by the court. Francis M. Blakely, as

38301

MAURIEL HERZOG, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
CHICAGO TITLE & TRUST COMPANY, a corporation, Appellee.	284 I.A. 653

MR. JUSTICE MELNIK DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in tort in the municipal court against the Chicago Title & Trust Company, as trustee of 25 East Delaware Building Corporation, to recover $300 and accrued interest on one of a series of bonds evidencing a mortgage indebtedness of $1,200,000. The court entered a finding in favor of defendant, from which plaintiff appeals.

The suit is predicated upon the theory that defendant as trustee permitted the property to be sold at the foreclosure sale for an inadequate amount, in violation of its trust, to the detriment of plaintiff, a nonparticipating bondholder. The essential facts disclose that in June, 1930, Chicago Title & Trust Company was designated as trustee in an indenture securing bonds aggregating $1,200,000 executed by the 25 East Delaware Building Corporation. The right to foreclose under the trust deed was vested solely in the trustee. The trust instrument provided that the trustee may bid for and purchase the mortgaged property without the production of any bonds or coupons or proof of ownership thereof. Subsequent to the filing of the foreclosure suit by the trustee, a reorganization plan was formulated by a bondholders' protective committee, accepted by 92% of the bondholders and approved by the court. Theodore M. Dickey, as

nominee of the committee, purchased the property at the foreclosure sale for $100,000. The sale and plan were approved, and the foreclosure was thus consummated. Plaintiff raises seven points in his brief, all of which resolve themselves into two fundamental questions: (1) whether the trustee, vested with the exclusive right to foreclose and having accepted the trust, was derelict in its duty and answerable in damages in not ascertaining the value of the property at the time of the sale, and in failing to bid in the premises for the fair marketable value thereof for the benefit of all bondholders, and (2) whether the inadequacy of the selling price in proportion to the indebtedness constitutes fraud as against the nondepositing bondholders.

The trust deed in question is set out in full in the abstract of record. Plaintiff relies on that portion thereof which provides that "all powers and rights of action hereunder may be exercised by the Trustee, at his election, without the possession or production of any of said bonds or coupons, or proof of ownership thereof." From this it is argued that it was mandatory upon the trustee to bid in the property on foreclosure for an amount commensurate with the mortgage indebtedness. We think the case of Chicago Title & Trust Co. v. Robin, 361 Ill. 261, is decisive on this point. In that case it was held that where a trust deed securing a real estate mortgage bond issue contains no provisions authorizing the trustee to bid at the foreclosure or conferring any power on the court to direct the trustee so to do, the court cannot require the trustee to bid an upset price on the petition of a nondepositing bondholder who objected to the confirmation of the sale to the committee upon a considerably smaller bid. From a careful examination of the trust deed here involved it appears that no greater powers were conferred on the trustee than in the Robin case. Moreover, the language employed in the

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than in the Robin case. Moreover, the language employed in the

trust deed empowered the trustee, at best, to bid the full amount of indebtedness at the foreclosure sale at its election, and thereby the exercise of the power became purely discretionary. Under the circumstances, in the absence of a showing of fraud or bad faith, the trustee cannot be held liable for the exercise of a fair discretion. (Palmer v. Bankers Trust Co., 12 Fed. (2nd) 747.)

Plaintiff's second point relates to the inadequacy of the price. It is argued that a bid of $100,000 on a $1,200,000 indebtedness is so inadequate as to indicate a fraudulent arrangement between the trustee and the bondholders' committee. We have examined the record and find no proof of fraud, collusion or irregularity in connection with the sale. It was held in Chicago Title & Trust Co. v. Robin, supra, that public policy and the interest of debtors require that stability be given to judicial sales and that they should not be disturbed unless there has been some fraud, mistake or violation of duty by the officer making the sale or by the purchaser, and that mere inadequacy of price, alone, is not cause for the setting aside of judicial sales.

The reorganization plan under which this property was sold was submitted to the court and approved, and some 92% of the bondholders joined therein. Plaintiff, as one of the nondepositing bondholders, had the privilege and was afforded the opportunity by the decree of joining the plan, but refused to do so. We must assume that the plan was equitable, since no criticism thereof is made by plaintiff and the court approved the same after notice to all depositing as well as nondepositing bondholders. If the reorganization plan was advantageous to those engaging in it, plaintiff may have had all these advantages by joining with the vast majority of bondholders who approved the plan, and if he chose to pursue another course, he had the opportunity of objecting to the confirmation of the plan and sale, either because of the inadequacy

trust deed empowered the trustee, at best, to bid the full amount of indebtedness at the foreclosure sale at its election, and thereby the exercise of the power becomes purely discretionary. Under the circumstances, in the absence of a showing of fraud or bad faith, the trustee cannot be held liable for the exercise of a fair discretion. (Palmer v. Hamilton Trust Co., 12 Fed. (2nd) 767.)

Plaintiff's second point relates to the inadequacy of the price. It is argued that a bid of $100,000 on a $1,800,000 indebtedness is so inadequate as to indicate a fraudulent arrangement between the trustee and the bondholders' committee. We have examined the record and find no proof of fraud, collusion or irregularity in connection with the sale. It was held in Chicago Title & Trust Co. v. Spain, supra, that public policy and the interest of debtors require that stability be given to judicial sales and that they should not be disturbed unless there has been some fraud, mistake or violation of duty by the officer making the sale or by the purchaser, and that mere inadequacy of price, alone, is not cause for the setting aside of judicial sales.

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of the sale price or for any other reason.

We think the proper forum for determining the rights of all bondholders in foreclosure proceedings is the court of chancery where the suit is pending. Plaintiff chose to go into another court for redress. He cites no cases supporting his contention that recovery may be had against a trustee for dereliction of duty under circumstances such as are herein presented, and we find no authority therefor. Plaintiff's was a tort action, predicated upon breach of duty, and the authorities are in agreement in holding that where a breach of trust is charged it must be proved by clear and convincing evidence. There is no evidence of fraud, dereliction of duty or collusion on the part of the trustee, and since the trust instrument did not require the trustee to bid in the property, as plaintiff contends, and under the Robin case, supra, the court could not impose that duty on the trustee under the form of trust instrument here employed, we think the trial court properly found the issues in favor of defendant. The judgment is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

of the sale price or for any other reason.

We think the proper forum for determining the rights of all bondholders in foreclosure proceedings is the court of chancery where the suit is pending. Plaintiff chose to go into another court for redress. He cites no cases supporting his contention that recovery may be had against a trustee for defaliction of duty under circumstances such as are herein presented, and we find no authority therefor. Plaintiff's sec. 5 part motion, predicated upon breach of duty, and the authorities are in agreement in holding that there a breach of trust is charged it must be proved by clear and convincing evidence. There is no evidence of fraud, defaliction of duty or collusion on the part of the trustee, and since the trust instrument did not require the trustee to bid in the property, as plaintiff contends, and under the <u>Ogden</u> case, <u>supra</u>, the court could not impose that duty on the trustee under the form of trust instrument here employed, we think the trial court properly found the issues in favor of defendant. The judgment is affirmed.

CAM ITA.

Scanlan, P. J., and Sullivan, J., concur.

38335

BLANCHE LaBARRE,
Appellee,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 653

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover $1,000 from defendant on a preliminary receipt issued to Ernest W. LaBarre, deceased, applicant for a life insurance policy. The cause was tried by the court without a jury and judgment entered in favor of plaintiff. Defendant appeals.

Plaintiff's statement of claim alleges that November 18, 1933, Ernest W. LaBarre, decedent, applied to defendant for a policy of life insurance of $1,000, naming plaintiff, his wife, as beneficiary; that decedent paid the first monthly premium of $2.92, and received from defendant's agent a receipt acknowledging payment of that sum, containing the following provision:

"It is understood that if this payment is equal to the full first monthly premium on said policy (but not otherwise), the insurance shall take effect from the date of the application, in accordance with the provisions of the policy applied for, provided, said application is approved and accepted at the Home Office of the Company, in Newark, N. J. under the plan, for the premium paid and amount of insurance applied for, and provided the life proposed was in sound health on the date of this application. It is further agreed that said Company will return the amount mentioned hereon if it declines to grant a policy on the above life."

It is alleged that on the date of the application decedent was in good health; that he died December 24, 1933; that notice of his death was given defendant, and payment refused.

Defendant's affidavit of merits admits the issuance of the

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BLANCHE LAMARRE, Appellee,	
v.	
THE PROMETHEUS INSURANCE COMPANY OF CHICAGO, a corporation, Appellant.	

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover $1,000 from defendant on a preliminary receipt issued to Ernest G. Lamarre, deceased, applicant for a life insurance policy. The cause was tried by the court without a jury and judgment entered in favor of plaintiff. Defendant appeals.

Plaintiff's statement of claim alleges that November 18, 1933, Ernest G. Lamarre, deceased, applied to defendant for a policy of life insurance of $1,000, naming plaintiff, his wife, as beneficiary; that decedent paid the first monthly premium of $2.92, and received from defendant's agent a receipt acknowledging payment of that sum, containing the following provision:

"It is understood that if this payment is equal to the full first monthly premium on said policy (but not otherwise), the insurance shall take effect from the date of the application, in accordance with the provisions of the policy applied for, provided said application is approved and accepted at the home office of the Company, in Newark, N. J., under the plan, for the premium paid and amount of insurance applied for, and provided the life proposed was in sound health on the date of said application. It is further agreed that said Company will return the usual conditional receipt if it declines to grant a policy on the above life."

It is alleged that on the date of the application decedent was in good health; that he died December 24, 1933; that notice of his death was given defendant, and payment refused.

Defendant's affidavit of merits admits the issuance of the

receipt and the making of the application, but states that the application was not approved and accepted by defendant, but on the contrary was rejected December 6, 1933; that decedent was not in sound health on the date of the application, but was suffering from tuberculosis and lues, and that he had been under the care of a physician for many years and had been treated in several hospitals; that after rejecting the application defendant made efforts to return the deposit of $2.92 to decedent, but he could not be found at his home or at his place of business. It is also averred that the application contained misrepresentations of material facts made by decedent, and that since the application was rejected and no policy issued defendant was not obliged to pay plaintiff, the beneficiary, any amount except the $2.92 deposited, which had been tendered and refused.

At the close of plaintiff's case defendant made a motion to find the issues in its favor. The court's denial of the motion is urged as ground for reversal. The application provides that the policy of insurance shall take effect from the date thereof in accordance with its provisions, provided, (1) that the application is approved and accepted at the home office of the company in Newark, N. J., under the plan, for the premium paid, and amount of insurance applied for; and (2) that the life proposed was in sound health on the date of the application. It is argued that as to the first proviso, defendant never approved and accepted the application, and that as to the second, the insured was not in sound health on the date of the application.

Plaintiff insists, and the court evidently took the view, that defendant, by its receipt, promised plaintiff the sum of $1,000 upon the death of decedent, and that since defendant elected to retain the premium until after decedent's death it was bound to pay the amount of the policy. Defendant introduced evidence tending to

receipt and the making of the application, but states that the application was not approved and rejected by defendant, but on the contrary was retained by it. Plaintiff states that he was not in sound health on the date of the application, but was suffering from tuberculosis and lues, and that he had been under the care of a physician for many years and had been treated in several hospitals; that after returning the application defendant made efforts to return the deposit of $1.00 to decedent, but he could not be found at his home or at his place of business. It is also averred that the application contained misrepresentations of material fact made by decedent, and that since the application was rejected and no policy issued defendant was not obliged to pay plaintiff, the beneficiary, any amount, except the $1.00 deposit, which has been tendered and refused.

At the close of plaintiff's case defendant made a motion to find the issues in its favor. The court's denial of the motion is urged as ground for reversal. The application provides that the policy of insurance shall take effect from the date indorsed in accordance with its provisions, provided, (1) that the application is approved and received at home office of the company in Newark, N. J., under the plan, for the premium paid, and amount of insurance applied for; and (2) that no illness or disease in sound health on the date of the application. It is sought that as the first proviso, defendant never approved and accepted the application, and that as to the second, the issues were not determined in the date of the application.

Plaintiff insists, on the court's ruling, on the view that defendant, by its receipt, promised plaintiff the sum of $1,000 upon the death of decedent, and that defendant failed to return the premium until after decedent's death in an effort to pay the amount of the policy. Defendant introduced evidence tending to

prove that the policy was rejected December 6, 1933, and that its agent, Henry Bosell, went to decedent's home two or three times to so notify him, but was unable to find him. Plaintiff denies that anyone ever called at their home for that purpose. We think it is immaterial, however, because it was incumbent upon plaintiff to make a prima facie case and show that the application was approved and accepted at the home office of the company in Newark, N. J., in accordance with one of the provises contained in the application, and since plaintiff failed to prove that essential fact no contractual relationship was created which would obligate defendant to pay the $1,000 claimed.

In Miller v. Illinois Life Ins. Co., 255 Ill. App. 586, an application for insurance was signed and the first year's premium paid by the applicant's note. Death ensued shortly thereafter, and it was said that

"An offer to enter into a contract which is not accepted creates no rights, but may be revoked or lapsed before acceptance. 13 C. J. p. 272; Esmay v. Gorton, 18 Ill. 483, 486; McKinley v. Watkins, 13 Ill. 140, 143; Cheboygan Paper Co. v. Swigart Paper Co., 140 Ill. App. 314, 316; Van Vlissingen v. Manning, 105 Ill. App. 255, 260; Cornwells & Elliott v. Krengel & Seiferd, 41 Ill. 394, 396; Bladel v. Carroll, 336 Ill. 168, 171; Travis v. Nederland Life Ins. Co., 104 Fed. 486, 488.

Delay in passing upon an application for insurance cannot be construed into an acceptance by the insurer. Bradley v. Federal Life Ins. Co., supra, 386; Morz v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 545; Winchell v. Iowa State Ins. Co., 103 Ia. 189, 193; Mandlier v. Knights of Columbus, 106 Neb. 267, 270."

It was also pointed out by the court that no acceptance of the application was pleaded or proved, and therefore no contract existed upon which a right of recovery could be based. The court said that

"If there was anthing in the application which, by delay in accepting or rejecting it, could be construed into a contract, it was the duty of the appellant to bring that matter to the attention of the court by proper pleading."

In the case at bar it was not claimed that there was any unusual delay in accepting the policy; in fact only about five weeks elapsed between the date of the application and decedent's death.

In Braman v. Mutual Life Ins. Co., 73 Fed. (2d) 391, an

prove that the policy was rejected December 6, 1955, and that its agent, Henry Howell, went to decedent's home two or three times to notify him, but was unable to find him. Plaintiff denies that anyone ever called at their home for that purpose. We think it is immaterial, however, because it was incumbent upon plaintiff to make a prima facie case and show that the application was approved and accepted at the home office of the company in Newark, N. J., in accordance with one of the provisos contained in the application, and since plaintiff failed to prove that essential fact no contractual relationship was created upon which could rest a legal defendant to pay the $1,000 claimed.

In Miller v. Pacific Life Ins. Co., 12 Ill. App. 386, an application for insurance was signed and the first year's premium paid by the applicant's note. Death ensued shortly thereafter, and it was held that

"an offer to enter into a contract which is not accepted creates no rights, but may be revoked or lapsed before acceptance. 15 C. J. p. 272; Emery v. Jackson, 16 L. 484, 486; Keighley v. Watkins, 15 Ill. 160, 162; Cobb v. Ohio Pac. Ins. Co., 14 Ill. App. 286, 140 Ill. 90, 314; Van Allsburgh v. Spencer, 170 Ill. 90, 288, 289; Connecticut Life v. Kessel, 41 Ill. App. 324, 326; Michel v. Bartell, 198 Ill. App. 171; Davis v. Equitable Life Ins. Co., 104 Ken. App. 483.

Delay in passing upon an application for insurance cannot be construed into an acceptance by the insurer. Bradley v. Federal Life Ins. Co., supra. See also Ins. Co. v. [illegible] Ins. Co., 180 N. Y. 327, 328; Ins. Co. v. [illegible] State Ins. Co., 105 Tex. 158, 159; Kendler v. Union of Quincy, 108 Ken. App. 272."

It was also pointed out by the court that no acceptance of the application was pleaded or proved, and therefore no contract existed upon which a right of recovery could be based. The court said that

"if there was nothing in the application, by delay in accepting or rejecting it, could be [illegible] it was the duty of the appellee to bring that fact to the attention of the court by proper pleading."

In the case at bar it is not [illegible] any unusual delay in accepting the policy; in fact, only [illegible] elapsed between the date of the application and decedent's death.

In Brown v. Union Life Ins. Co., 76 App. (2d) 322, an

action was likewise brought to recover on a receipt. The policy issued the day following the death of the applicant, but was never delivered. In affirming judgment entered upon a directed verdict for the insurance company, the circuit court of appeals said (p.396):

"The next condition contained in the application is, 'provided this application shall be approved.' The offer of defendant was not for present insurance, but an agreement to insure at some future time, to wit, on the approval of the application. Up to the time of the approval of the application there was no contract of insurance, and the company reserved the right to approve or reject the application. (Italics ours.) As said by us in an opinion by Judge Woodrough in Brancato v. National Reserve Life Ins. Co., 35 Fed. (2d) 612, 613:

'Binding receipts substantially like the one relied upon by appellant have received frequent consideration by the courts, and it is settled that the right reserved to the insurance company to accept or reject the application for insurance referred to in the receipt is absolute. Such binding receipts leave it within the power of the company wholly to reject, without giving any reason, and the whole subject, both affirmatively and negatively, is within its choice and discretion. * * *"

Jacobs v. New York Life Ins. Co., 15 So. 639 (Miss), is to the same effect.

The only case cited in plaintiff's brief is Germania Life Ins. Co. v. Koehler, 138 Ill. 293. In that case the action was predicated on a policy which had actually been issued and a number of premiums had been paid thereon. The application had without question been accepted and the policy delivered to the insured. Thereafter the policy was assigned as collateral security for a loan, and the case was decided on the question of whether or not there was a waiver by the insurance company of a condition in the policy. The case has no application to the question before us.

That defendant rejected the policy is borne out by direct evidence on that point, and also by circumstances showing the reasons for rejecting it. Several answers to questions propounded to decedent when the application was taken were untrue. Applicant stated that he had never been rejected for insurance, whereas the evidence shows that he had been rejected in May, 1932. Dr. John Soukup examined him at that time and testified that he noticed an opening in decedent's neck, which showed fluid and pus, and that

motion was likewise brought to recover on a receipt. The policy

issued the day following the death of the applicant, but was never

delivered. In affirming judgment entered upon a directed verdict

for the insurance company, the circuit court of appeals said (p.260):

> "The next condition contained in the application is, 'provided this application shall be approved.' The error of defendant was not for some of insurance, but an agreement to insure at some time in the future, on the approval of the application. Up to the time of the approval of the application there was no contract of insurance, and the company was under no right to approve or reject the application. (Italics ours.) An insurance policy is in an relation to judge to approve or disapprove, National Reserve Life Ins. Co., 51 Ind. App. 61, 61-64, 61-64:
>
> 'Until the insured under which life insurance upon the application has been approved by the company, it is not a contract of insurance, and it is in accordance with the right of the company to accept or reject the application for insurance offered to it in the receipt is absolute. Such binding receipts have it within the power of the company wrongfully to withhold, without giving any reason, and the whole subject, both arbitrarily and capriciously, is within its choice and discretion.'

Jacobs v. New York Life Ins. Co., 1 F. (2d) 224 (Ind.), is to the same effect.

No only case cited in plaintiff's brief is Cummins Life Ins. Co. v. Lopher, 138 Ill. 488. In that case the action was predicated on a policy which had been duly issued and a number of premiums had been paid thereon. The applicant had died after the policy had been accepted and the policy delivered to the insured. Nevertheless the policy was assigned as collateral security for a loan, and the case was decided on the question of waiver or estoppel. There was a waiver by the insurance company of a condition in the application, the case has no application to the question before us.

Just [illegible] the policy is being sued on by without evidence on that point, but also by stipulation about the reason for rejecting it. Several cases [illegible] to decision even the application was taken [illegible]. [illegible] stated that it had never been rejected. The [illegible] evidence shows that it has been rejected in [illegible]. [illegible] Sunday examined him at that time and [illegible] opening in August's book, which showed [illegible] and that

the medical department of the insurance company therefore rejected his application. Decedent also stated that his condition of health was good, but Dr. Campbell testified that he had tuberculosis and was incurable; that he had attended decedent from 1926 to 1932, some 50 or 75 times, and it appears that he had been operated in 1925 for tubercular glands and again for appendicitis in 1927.

From what has been said we think that the court should have sustained defendant's motion for a finding at the close of plaintiff's case, and the court's refusal so to do constituted error. Plaintiff failed to make a prima facie case. Her sole ground for recovery is based upon the theory that the defendant elected to retain the premium and was therefore bound to pay the amount of the policy. This is not sustained by the evidence. She failed to show acceptance and approval of the application and also that decedent was in good health when he applied for insurance. Failure to establish either of these provisos would defeat plaintiff's claim. The judgment of the municipal court is therefore reversed, and judgment entered here in favor of defendant for costs.

REVERSED AND JUDGMENT HERE FOR DEFENDANT
FOR COSTS.

Scanlan, P. J., and Sullivan, J., concur.

the medical department of the insurance company therefore rejected his application. Decedent also stated that his condition of health was good, but Dr. Campbell testified that he had tuberculosis and was insurable; that he had attended decedent from 1920 to 1932, some 50 or 75 times, and it appears that he had been operated in 1925 for tubercular glands and again for appendicitis in 1927.

From what has been said we think that the court should have sustained defendant's motion for a finding at the close of plaintiff's case, and the court's refusal so to do constituted error. Plaintiff failed to make a prima facie case. Her sole ground for recovery is based upon the theory that the defendant elected to retain the premium and was therefore bound to pay the amount of the policy. This is not sustained by the evidence. He failed to show acceptance and approval of the application and also that decedent was in good health when he applied for insurance. Failure to establish either of these propositions would defeat plaintiff's claim. The judgment of the municipal court is therefore reversed, and judgment entered here in favor of defendant for costs.

HOLMES & MCL. JJ. DISSENT; HE F FOR AFFIRMING THE COURT.

Conlon, P. J., and Wilkins, J., concur.

38368

MOY WANG,
Appellee,

v.

JOSEPH WHELAN and
HARRY M. KIPLEY,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

284 I.A. 653

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the municipal court to recover damages for injuries sustained while in the employ of S. Moy, defendants' tenant, due to a defective condition of the floor in the demised premises. The cause was heard by the court without a jury, resulting in findings and judgment for $500 in favor of plaintiff. Defendants appeal.

The facts disclose that S. Moy had for about twenty-three years conducted a laundry on premises owned by defendants. At the beginning of the tenancy the parties had a written lease, the terms of which are not disclosed by the evidence, but in later years no written leases were entered into by the parties. The floor in the laundry had become warped in places, and Moy advised defendants that he would not remain unless they repaired the floor. In May, 1933, Harry M. Kipley, one of the defendants, conferred with Moy relative to a lease of the premises for the years 1933 and 1934, and agreed that if Moy would remain in the premises and enter into a lease he would fix the floor and make other necessary repairs.

In January, 1934, plaintiff, Moy's employee, fell in the laundry and fractured his leg, and it is his contention that he caught his foot in an opening in the defective floor. The case

38368

MOY SANG,
Appellee,

v.

JOSEPH HELAN and
HENRY M. KIPLEY,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MATHEWS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the municipal court to recover damages for injuries sustained while in the employ of S. Moy, defendants' tenant, due to a defective condition of the floor in the demised premises. The cause was heard by the court without a jury, resulting in findings and judgment for $500 in favor of plaintiff. Defendants appeal.

The facts disclose that S. Moy had for about twenty-three years conducted a laundry on premises owned by defendants. At the beginning of the tenancy the parties had a written lease, the terms of which are not disclosed by the evidence, but in later years no written lease were entered into by the parties. The floor in the laundry had become warped in places, and Moy advised defendants that he would not remain unless they repaired the floor. In May, 1933, Harry M. Kipley, one of the defendants, conferred with Moy relative to a lease of the premises for the years 1933 and 1934, and agreed that if Moy would remain in the premises and enter into a lease he would fix the floor and make other necessary repairs.

In January, 1934, plaintiff, Moy's employee, fell in the laundry and fractured his leg, and it is his contention that he caught his foot in an opening in the defective floor. The case

was rather loosely tried. Plaintiff did not appear as a witness, and his absence is unexplained. Moy, the tenant, testified as to the manner in which the injury occurred, but he did not state that he saw the accident, and for aught that appears in the record his testimony is based on what plaintiff told him. Evidently there were no eyewitnesses to the accident. The defect in the floor was patent, and although there is no specific proof in the record it may be assumed that plaintiff had been employed by Moy, the tenant, for some time and knew of the defective condition of the floor, which was plainly visible. Under the settled rule of law in this state plaintiff assumed the burden of proving that he was not guilty of contributory negligence. (Calumet Iron & Steel Co. v. Martin, 115 Ill. 358; Jorgenson v. Johnson Chair Co., 169 Ill. 429; Segal v. C. B. & Q. Ry. Co., 256 Ill. App. 569; Urban v. Pere Marquette R. R. Co., 266 Ill. App. 152.) He evidently recognized the burden thus imposed upon him by law, because in his statement of claim he alleged that he was at all times in the exercise of due care and caution for his own safety. But there is no evidence to sustain the allegation. The only testimony as to the manner in which the accident occurred was elicited from Kipley, one of the defendants, who stated that Moy, the tenant, "brought me into the store and showed me where the board was buckled up. He said, 'his (plaintiff's) foot got under the board and he twisted it and his leg was broken.' That was one of the places that I, prior to that time, agreed to repair."

Plaintiff contends that the following testimony indicates that Moy was an eyewitness to the accident:

> "The morning Moy Wang fell down he worked for me and carried clothes to the dry room. The floor had a piece of wood that came up, and he fell down and broke his foot."

Moy was not asked whether he witnessed the accident, and he did not say that he did. From the foregoing excerpt we cannot assume that he was an eyewitness. No one else claims to have seen the accident.

was rather loosely tried. Plaintiff did not appear as a witness, and his absence is unexplained. Moy, the tenant, testified as to the manner in which the injury occurred, but he did not state that he saw the accident, and for aught that appears in the record his testimony is based on what plaintiff told him. Evidently there were no eyewitnesses to the accident. The defect in the floor was patent, and although there is no specific proof in the record it may be assumed that plaintiff had been employed by Moy, the tenant, for some time and knew of the defective condition of the floor, which was plainly visible. Under the settled rule of law in this state plaintiff assumed the burden of proving that he was not guilty of contributory negligence. (Delaney Iron & Steel Co. v. Martin, 115 Ill. 358; Ferguson v. Johnson Chair Co., 148 Ill. 429; Legal v. C. B. & Q. Ry. Co., 336 Ill. pp. 589; Urban v. Pere Marquette R. R. Co., 264 Ill. pp. 188.) He evidently recognized the burden thus imposed upon him by law, because in his statement of claim he alleged that he was at all times in the exercise of due care and caution for his own safety. But there is no evidence to sustain the allegation. The only testimony as to the manner in which the accident occurred was elicited from Aigley, one of the defendants, who stated that Moy, the tenant, "brought me into the store and showed me where the board was buckled up. He said, 'the (plaintiff's) foot got under the board and he twisted it and his leg was broken.' That was one of the places that I, prior to that time, agreed to repair."

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Moy was not asked whether he witnessed the accident, and he did not say that he did. From the foregoing excerpt we cannot assume that he was an eyewitness. No one else claims to have seen the accident.

Therefore, the question whether plaintiff was in the exercise of due care and caution for his own safety is left entirely to conjecture. Since the burden of proving this element was upon plaintiff, and no showing was made that he was in the exercise of due care and caution for his own safety at the time of the accident, an essential element of plaintiff's proof is lacking. Inasmuch as the defective condition of the floor had been known to the tenant for a long time, and was clearly noticeable so that any person walking over it would be required to exercise care and caution for his own safety, the question of contributory negligence is one of considerable importance and should not have been left to surmise and conjecture.

Under an additional affidavit of merits filed by leave of court, it was averred that at the time of the accident plaintiff and defendants were engaged in an enterprise within the purview of the Workmen's Compensation act. Defendants operated and controlled more than one building and store, and Moy was engaged in operating a laundry business and was plaintiff's employer. It is conceded that plaintiff was injured during the hours of his employment, and while engaged in his work. Defendants argue that if Moy, in the operation of his business, used certain types of machinery, he would automatically be brought within the provisions of the act, and since defendants had leased a building which was used for business purposes and for which they received rent, they would likewise automatically come within the purview of the statute. Plaintiff agrees with this interpretation of the Workmen's Compensation act. In the course of the trial defendants sought to lay the foundation for this defense by asking Moy, "What machinery have you got there?" to which plaintiff's counsel objected. The court sustained the objection. The question was repeated when Kipley, one of the defendants, testified, and again the court sustained the objection, whereupon defendants' counsel made the following

Therefore, the question whether plaintiff was in the exercise of due care and caution for his own safety is left entirely to conjecture. Since the burden of proving this element was upon plaintiff, and no showing was made that he was in the exercise of due care and caution for his own safety at the time of the accident, an essential element of plaintiff's proof is lacking. Inasmuch as the defective condition of the floor had been known to the tenant for a long time, and was clearly noticeable so that any person walking over it would be required to exercise care and caution for his own safety, the question of contributory negligence is one of considerable importance and should not have been left to surmise and conjecture.

Under an additional affidavit of merits filed by leave of court, it was averred that at the time of the accident plaintiff and defendants were engaged in an enterprise within the purview of the Workmen's Compensation act. Defendants operated and controlled more than one building and store, and Joy was engaged in operating a laundry business and was plaintiff's employer. It is conceded that plaintiff was injured during the hours of his employment, and while engaged in his work. Defendants argue that if Joy, in the operation of his business, used certain types of machinery, he would automatically be brought within the provisions of the act, and since defendants had leased a building which was used for business purposes and for which they received rent, they would likewise automatically come within the purview of the statute. Plaintiff agrees with this interpretation of the Workmen's Compensation act. In the course of the trial defendants sought to lay the foundation for this defense by asking Joy, "What machinery have you got there?" to which plaintiff's counsel objected. The court sustained the objection. The question was repeated when Ripley, one of the defendants, testified, and again the court sustained the objection, whereupon defendants' counsel made the following

statement: "I have set up that as an affirmative defense. I have set up that this comes under the Workmen's Compensation act and I desire to show what machinery he has in the place to show if he does come within the purview of the Workmen's Compensation act and I can only prove that by the witness." Notwithstanding counsel's statement, the court sustained the objection. It is urged by plaintiff that the questions were improper because they did not direct the witness's attention specifically to the machinery on the premises at the time of the accident. The question should have been more specific and the inquiry should have been directed to the machinery used in the laundry at the time of the accident. We believe the cause should be retried, and upon retrial defendants should be permitted to adduce such competent proof as they may have in support of their defense in this respect, and to show, if they can, that the parties came within the purview of the act. It seems to be conceded that under sections 6 and 29 of the Workmen's Compensation act (Cahill's Ill. Rev. Stats., 1933) plaintiff could not maintain a common law action against defendants if he received an injury in the course of his employment by Moy, assuming that Moy was engaged in an enterprise or business subject to the act, and that his only remedy was to recover compensation from his employer, who in turn would have the right of subrogation to recover from defendants. Under the circumstances we regard it unnecessary to consider the remaining contention of defendants that anyone in privity with a tenant cannot recover from the landlord for personal injuries due to the landlord's failure to repair premises which had passed into the control and possession of the tenant, even though the landlord had agreed to make repairs.

For the reasons stated herein this cause should be retried, and accordingly the judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

statement: "I have set up that as an affirmative defense. I have set up that this comes under the workmen's compensation act and I desire to show what machinery he has in the place to show if he does come within the purview of the workmen's compensation act and I can only prove that by the witness." Notwithstanding counsel's statement, the court sustained the objection. It is urged by plaintiff that the questions were improper because they did not direct the witness's attention specifically to the machinery on the premises at the time of the accident. The question should have been more specific and the inquiry should have been directed to the machinery used in the laundry at the time of the accident. We believe the cause should be remanded, and upon retrial defendants should be permitted to adduce such competent proof as they may have in support of their defense in this respect, and to show, if they can, that the parties were within the purview of the act. It seems to be conceded that under sections 6 and 22 of the workmen's compensation act (Smith's Ill. Rev. Stats., 1922) plaintiff could not maintain a common law action against defendants if he received an injury in the course of his employment by defendants, assuming that he was engaged in an enterprise or business subject to the act, and that his only remedy was to recover compensation from his employer, who in turn would have the right of subrogation to recover from defendants. Under the circumstances we regard it unnecessary to consider the remaining contention of defendants that unless in privity with a tenant cannot recover from the landlord for personal injuries due to the landlord's failure to repair premises which had passed into the control and possession of the tenant, even though the landlord had agreed to make repairs.

For the reasons stated herein this cause should be reversed, and accordingly the judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Sullivan, J., concur.

38398

IN RE PETITION OF SAM RATNOFSKY, TO BE DISCHARGED FROM CUSTODY UNDER INSOLVENT DEBTORS' ACT,
Appellee,

v.

ROBERT WILLS, a minor, by Louis Wills, his father and next friend,
Appellant.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

284 I.A. 653

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Respondent appeals from an order of the county court discharging petitioner from the custody of the sheriff of Cook county under a capias ad satisfaciendum, pursuant to the Insolvent Debtors' act.

Robert Wills, a minor, by his father and next friend, brought suit against petitioner in the superior court for damages resulting from an injury caused by an automobile driven by petitioner. The declaration, consisting of four counts, charged ordinary negligence, as well as wilful and wanton misconduct. The fourth count contained the following specific allegation:

"That at said time, numerous school children of tender years were crossing upon and over said Western avenue from the west side thereof to the east side thereof, then so crossing upon the signal of a police officer and patrol boys there stationed to regulate traffic, the northbound and southbound vehicle traffic then and there, at the time said school children and plaintiff were so crossing, having been signalled to stop by said police officer and patrol boys; and that said defendant then and there not regarding his duty in the premises and with conscious indifference to surrounding circumstances and conditions, then and there driving northward on said Western avenue, did not stop but wilfully and wantonly drove, ran, managed, used, operated and controlled his said automobile in a northerly direction along and upon said Western avenue * * * and then and there wilfully and wantonly drove and ran the same upon and against the plaintiff, etc."

Trial was had by jury upon issues joined by defendant's

IN RE PETITION OF SAM HAMOWITZ, TO BE DISCHARGED FROM THEIR UNDER INSOLVENT DEBTOR'S ACT, Appellee,	APPEAL FROM COOK COUNTY OF COOK COUNTY.
v.	2344 I.A. 653
ROBERT WILLS, a minor, by Louis Wills, his father and next friend, Appellant.	

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT.

Respondent appeals from an order of the county court discharging petitioner from the custody of the sheriff of Cook county under a <u>capias ad satisfaciendum</u>, pursuant to the Insolvent Debtors' act.

Robert Wills, a minor, by his father and next friend, brought suit against petitioner in the superior court for damages resulting from an injury caused by an automobile driven by petitioner. The declaration, consisting of four counts, charged ordinary negligence, as well as wilful and wanton misconduct. The fourth count contained the following specific allegations:

"That at said time, numerous school children of tender years were crossing Mann and over said Western avenue from the west side thereof to the east side thereof, then so crossing upon the signal of a police officer and patrol boys there stationed to regulate traffic, the northbound and southbound vehicle traffic then and there, at the time said school children and plaintiff were so crossing, having been signalled to stop by said police officer and patrol boys and that said defendant then and there not regarding his duty in the premises and with conscious indifference to surrounding circumstances and conditions, then and there driving northward on said Western avenue, did not stop but wilfully and wantonly drove, ran, managed, used, operated and controlled his said automobile in a northerly direction along and upon said Western avenue * * * and then and there wilfully and wantonly drove and ran the same upon and against the plaintiff, etc."

Trial was had by jury upon issues joined by pleadings,

plea. In addition to a general verdict, the jury were required to answer by special interrogatory whether

"the automobile of the defendant was at the time and place in question willfully and wantonly driven, managed and operated by defendant, with total disregard and conscious indifference to surrounding circumstances and conditions, and as a result thereof plaintiff was knocked down and injured."

This interrogatory was answered by the jury in the affirmative and upon the special and general verdict for $4,500 the court entered judgment. To enforce the judgment so obtained, respondent caused a capias ad satisfaciendum to issue out of the superior court for the arrest of petitioner, who thereupon filed his petition and bond in the county court under the Insolvent Debtors' act for his release. Upon the hearing petitioner introduced in evidence the record and pleadings of the superior court, including the writ of capias ad satisfaciendum under which he had been arrested, the declaration filed in the superior court, consisting of the four counts hereinbefore mentioned, petitioner's plea, the court's instructions to the jury, the special interrogatory, the verdicts, the judgment of the court and letters of guardianship of the minor's estate, issued to Louis Wills. After hearing the county court entered an order finding that malice was not the gist of the action in the superior court case, and ordered petitioner discharged.

As grounds for reversal it is urged that where a petitioner under the Insolvent Debtors' act, who has been taken into custody on a writ of capias ad satisfaciendum, based upon a judgment against him in an action of tort, fails to show that malice was not the gist of the action, he is not entitled to a discharge. Respondent cites several cases to support his contention. The first of these is Fetz v. People, 239 Ill. App. 250. In that case petitioner also sought his release from a tort judgment under the Insolvent Debtors' act. The declaration in the injury suit consisted of four counts, the

plea. In addition to a general verdict, the jury were required to answer by special interrogatory whether

"the automobile of the defendant was at the time and place in question willfully and wantonly driven, managed and operated by defendant, with total disregard and conscious indifference to surrounding circumstances and conditions, and as a result thereof plaintiff was knocked down and injured."

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As grounds for reversal it is urged that where a petitioner under the Insolvent Debtors' act, who has been taken into custody on a writ of capias ad satisfaciendum, based upon a judgment against him in an action of tort, fails to show that malice was not the gist of the action, he is not entitled to a discharge. Respondent cites several cases to support his contention. The first of these is Ex parte v. People, 230 Ill. App. 520. In that case petitioner also sought his release from a tort judgment under the Insolvent Debtors' act. The declaration in the injury suit consisted of four counts, the

third of which charged that the willful, wanton and malicious driving of an automobile by defendant caused respondent's injuries. The fourth count charged that petitioner with force and arms assaulted plaintiff, and with great force and violence drove his automobile to and against her, contrary to the peace of the people, etc. The judgment was based upon a general verdict of the jury, and a capias ad satisfaciendum had issued. In discussing the question under consideration, the court said: (p. 253)

"When the jury found Fetz guilty there were but two counts in the declaration, one of which charged that he wilfully, maliciously and wantonly drove his automobile, and the other that he, with force and arms, assaulted the plaintiff. Each of those charges connotes malice as it is generally defined when making a legal interpretation of the word as used in such a statute as the one in question."

The court cited Seney v. Knight, 292 Ill. 206, and quoted therefrom as follows:

"The term 'malice' as used in the Insolvent Debtors' act, applies to that class of wrongs which are inflicted with an evil intent, design or purpose." (Citing Jernberg v. Mix, 199 Ill. 254; Kellar v. Norton, 228 Ill. 356; In re Murphy, 109 Ill. 31; First National Bank of Flora v. Burkett, 101 Ill. 391.)

The court also quoted from Bromage v. Prosser, 4 Barn. & C., 247 as follows:

"Malice in common acceptance means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse."

As to the right of respondent to the issuance of a capias under similar circumstances, the court cited and quoted from People v. Walker, 286 Ill. 541, as follows:

"The statute provides that the plaintiff may have execution against the body of the defendant when the same is authorized by law, but does not declare when the same is authorized by law, though it does except from the prohibition against such an execution judgments obtained for a tort committed by the defendant, thus impliedly recognizing that in such cases an execution against the body is authorized by law." (Marshall Field & Co. v. Freed, 269 Ill. 558.)

In the Fetz case, supra, the court recognized the tendency of the law against imprisonment for debt, and said that in interpreting the common law on that subject as applicable to the rights of the

ship of which charged that the willful, wanton and malicious driving of an automobile by defendants caused respondent's injuries. The fourth count charged that petitioner with force and arms assaulted plaintiff, and with great force and violence drove his automobile to and against her, contrary to the peace of the people, etc. The judgment was based upon a general verdict of the jury, and a capias ad satisfaciendum had issued. In discussing the question under consideration, the court said: (p. 482)

"When the jury found "we find the defendants guilty" there were but two counts in the declaration, one of which charged that he willfully, maliciously and wantonly drove his automobile, and the other that he, with force and arms, assaulted the plaintiff. Each of those charges connotes malice as it is generally defined when making a legal interpretation of the word as used in such a statute as the one in question."

The court cited Tenney v. Jenkins, 290 Ill. 406, and quoted therefrom as follows:

"The term 'malice' as used in the Incompetent Debtors' act, applies to that class of wrongs which are inflicted with an evil intent, design or purpose." (Citing Jurgensen v. Mix, 199 Ill. 254; Keller v. Horton, 222 Ill. 326; In re Murphy, 109 Ill. 313; First National Bank of Ottawa v. Burkett, 101 Ill. 321.)

The court also quoted from Brownage v. Hosser, 4 Hun. 4 C., 147 as follows:

"Malice in common acceptance means ill-will against a person but in the legal sense it means a wrongful act done intentionally without just cause or excuse."

As to the right of respondent to the issuance of a capias under similar circumstances, the court cited and quoted from People v. Talkor, 186 Ill. 241, as follows:

"The statute provides that the plaintiff may have execution against the body of the defendant, when the same is authorized by law, but does not declare when the same is authorized by law, though it does exempt from the prohibition against such an execution judgments obtained for a tort committed by the defendant, thus impliedly recognizing that in such cases an execution against the body is authorized by law." (Mayhall Vinil A. v. Treed, 205 Ill. 5.)

In the Yeck case, supra, the court recognized the tendency of the law against imprisonment for debt, and said that in interpreting the common law on that subject as applicable to the rights of the

judgment creditor it generally became necessary to find some reason beyond mere indebtedness to justify the summary issuance of a capias; that (p. 254):

"Perhaps that reason may be said to exist in the fact that in case of a money judgment obtained in a tort case, the judgment represents an adjudication that without ordinary care, or wilfully or maliciously, the judgment debtor has done or refrained from doing something which the law especially disfavors, and that such conduct justifies as a reasonable penal consequence, giving the judgment creditor, in endeavoring to obtain satisfaction of his judgment, greater rights than exist in ordinary cases. Of course the rigor of the common law, in this State, is very much lessened by the Insolvent Debtors' act (Cahill's Stat., chap. 72) which provides for release where 'malice' is not the gist of the action."

The court concluded by holding that in view of the allegations of the declaration, it could not be said that malice was not the gist of the action, and affirmed the county court's order denying the petition for a release.

Kaplan v. Williams, 245 Ill. App. 542, followed the reasoning and conclusion reached in Fetz v. People, supra. In the former case a capias ad satisfaciendum was likewise issued under a tort judgment resulting from automobile injuries. The declaration there consisted of five counts, one of which, the third, charged wilful, wanton and malicious driving. There, as here, the court propounded a special interrogatory, which the jury answered in the affirmative, together with its general verdict finding defendant guilty. The court held that upon petition for his discharge from imprisonment it may be shown that the verdict was upon counts of which malice was not the gist, but that the burden of making such showing was on the petitioner, citing In re Hinson, 162 Ill. App. 121. The court in the Kaplan case at p. 545, quoted from Bremer v. L. E. & W. R. Co., 318 Ill. 11, as follows:

"If there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or wilfulness. * *"

judgment creditor it generally become necessary to find some reason beyond mere indebtedness to justify the summary issuance of a capias; that (p. 324):

> "Perhaps that reason may be said to exist in the fact that in case of a money judgment obtained in a tort case, the judgment represents an adjudication that without ordinary care, or wilfully or maliciously, the judgment debtor has done or refrained from doing something which the law especially disfavors, and that such conduct justifies as a reasonable penal sanction, giving the judgment creditor, in endeavoring to obtain satisfaction of his judgment, greater rights than exist in ordinary cases. Of course the rigor of the common law, in this state, is very much lessened by the insolvent debtors' act (Gen'l'l's Stat., chap. 74) which provides for release where 'malice' is not the gist of the action."

The court concluded by holding that in view of the allegations of the declaration, it could not be said that malice was not the gist of the action, and affirmed the county court's order denying the petition for a release.

Kaplan v. Williams, 325 Ill. app. 642, followed the reasoning and conclusion reached in Jeta v. Tuczek, supra. In the former case a capias ad satisfaciendum was likewise issued under a tort judgment resulting from automobile injuries. The declaration there contained of five counts, one of which, the third, charged wilful, wanton and malicious driving. There, as here, the court propounded a special interrogatory, which the jury answered in the affirmative, together with its general verdict finding defendant guilty. The court held that upon petition for his discharge from imprisonment it may be shown that the verdict was upon counts of which malice was not the gist, but that the burden of making such showing was on the petitioner, citing In re Hinman, 180 Ill. App. 124. The court in the Kaplan case at p. 642, quoted from Lemon v. L. A. & W. R. Co., 13 Ill. 11, as follows:

> "If there is any evidence in the record tending to show such gross want of care as implies a wilful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or wilfulness."
>
> * *

The same result was reached in Mantske v. Rhutassel, 248 Ill. App. 492, under similar circumstances. A capias ad satisfaciendum had issued pursuant to a tort judgment based upon a declaration consisting of five counts, four of which charged general negligence and the fifth wilful and wanton misconduct in driving an automobile. The court held that it was incumbent upon the judgment debtor or petitioner to show that malice was not the gist of the action. A special verdict had been returned with the general verdict, and the court held that this was equivalent to a finding that malice was the gist of the action and precluded the defendant from securing his release under the Insolvent Debtors' act, citing Fromm v. Seyller, 245 Ill. App. 392, and Fetz v. People, 239 Ill. App. 250.

Petitioner argues that the malice charge must be actual, and that "implied malice," "constructive malice," "inferred malice," or "imputed malice" will not preclude the right to a discharge, and some early Illinois cases are cited, from which it is argued that the malice necessary to be shown is the intentional prepetration of the injury or wrong on another. However, the cases hereinbefore cited, under precisely similar facts, hold that allegations of wilful and wanton driving connote malice as it is generally defined when making a legal interpretation of the word as used in the Insolvent Debtors' act. Mantske v. Rhutassel, supra, and the cases cited therein hold that the special verdict of the jury, finding that one is guilty of wilfulness and wantonness in the operation of an automobile, is equivalent to a finding that malice is the gist of the wrong charged. We think the affirmative reply to the special interrogatory in the instant case was equivalent to a finding that malice was the gist of the action. Since it was incumbent upon petitioner to assume the burden of proving the contrary, and no such

The same result was reached in Gordyke v. Hunnewell, 262 Ill. App. 492, under similar circumstances. A capias ad satisfaciendum had issued pursuant to a court judgment based upon a declaration consisting of five counts, four of which charged general negligence and the fifth wilful and wanton misconduct in driving an automobile. The court held that it was incumbent upon the judgment debtor or petitioner to show that malice was not the gist of the action. A special verdict had been returned with the general verdict, and the court held that this was equivalent to a finding that malice was the gist of the action and precluded the defendant from securing his release under the insolvent debtors' act, citing Kirby v. Boylston, 94 Ill. 369, 372, and Ward v. People, 226 Ill. 509, pp. 520.

Petitioner argues that the malice charge must be actual, and that "implied malice," "constructive malice," "inferred malice," or "implied malice" will not preclude the right to a discharge, and some early Illinois cases are cited, from which it is argued that the malice necessary to be shown is the intentional perpetration of the injury or wrong on another. However, the cases hereinbefore cited, under precisely similar facts, hold that allegations of wilful and wanton driving constitute malice as it is generally defined when making a legal interpretation of the word as used in the insolvent debtors' act. Martens v. Hunnewell, supra, and the cases cited therein hold that the special verdict of the jury, finding that one is guilty of wilfulness and wantonness in the operation of an automobile, is equivalent to a finding that malice is the gist of the wrong charged. We think the affirmative reply to the special interrogatory in the instant case was equivalent to a finding that malice was the gist of the action. Since it was incumbent upon petitioner to assume the burden of proving the contrary, and no such

proof was offered, he was not entitled to be released from custody, and therefore the order of the county court is reversed and the cause is remanded with directions that he be returned to the custody of the sheriff.

REVERSED AND REMANDED WITH
DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

proof was offered, he was not entitled to be released from custody, and therefore the clerk of the county court is reversed and the cause is remanded with directions that he be returned to the custody of the sheriff.

REVERSED AND REMANDED WITH DIRECTIONS.

Bonham, P. J., and Gallivan, J., concur.

38430

JAMES E. GORMAN,
Plaintiff and Counter Defendant below,
Appellant,

v.

MAE GORMAN,
Defendant and Counter Plaintiff below,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

284 I.A. 654

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, James E. Gorman, filed a bill for divorce against Mae Gorman, his wife, charging several acts of cruelty, and Mae Gorman filed a cross bill for separate maintenance. The court dismissed both proceedings for want of equity. Plaintiff appeals.

It is the principal contention of both parties that the court failed to conduct the hearing in a fair and impartial manner, in that he prejudged the merits of both plaintiff's and defendant's cause without hearing any evidence.

When the case was called for hearing a discussion ensued between court and counsel for both sides relative to the charges and countercharges, the circumstances of the parties and the issues involved. Almost at the outset, and before any evidence had been offered or received, the court informed counsel for plaintiff that:

"You haven't got much chance to get any divorce, I will tell you that. You haven't got much chance. What is her counter claim?

Well, the probabilities are, if there is a conflict in the evidence in the case, I will throw you both out.

38430

JAMES E. GOTMAN, Plaintiff and Counter Defendant below, Appellant,	APPEAL FROM JURISDICTION
v.	COOK, COOK COUNTY.
MAE GOTMAN, Defendant and Counter Plaintiff below, Appellee.	

254 I.A. 654

MR. JUSTICE MEARS DELIVERED THE OPINION OF THE COURT.

Plaintiff, James E. Gotman, filed a bill for divorce against Mae Gotman, his wife, charging several acts of cruelty, and Mae Gotman filed a cross bill for separate maintenance. The court dismissed both proceedings for want of equity. Plaintiff appeals.

It is the principal contention of both parties that the court failed to conduct the hearing in a fair and impartial manner, in that he prejudged the merits of both plaintiff's and defendant's cause without hearing any evidence.

When the case was called for hearing a discussion ensued between court and counsel for both sides relative to the charges and counter-charges, the circumstances of the parties and the issues involved. Almost at the outset, and before any evidence had been offered or received, the court informed counsel for plaintiff that:

"You haven't got much chance to get any divorce, I will tell you that. You haven't got much chance, what is her counter claim?

Well, the probabilities are, if there is a conflict in the evidence in the case, I will throw you both out.

Yes, that is what probably will happen. Here are people, there are no children, I am not so keen on this business of a man being tied up for the balance of his life to a woman. You can go on with your case if you want to, but where are you - suppose he makes a case, that I am compelled to give him a divorce? Then where is she?"

Thereafter the following proceedings took place:

"Mr. Vlach: (Counsel for defendant.) Well, then we have had a hearing, your Honor, we are through.

The Court: Is that all you want? Is that all you want, just a hearing?

Mr. Vlach: That's all. I don't believe in forcing my client into a divorce, if your Honor please, in her present condition.

The Court: All right, go on.

Mr. Vlach: All right.

The Court. Let me see the files. But I will warn you in advance, I am not very keen on this business of granting a man, a physically powerful policeman, a divorce from a frail woman on the ground of cruelty. I am not very keen about it. Never mind, don't tell me what witnesses you have got, I don't want to hear what witnesses you have got, but I haven't seen one case in eighteen years of cruelty against a wife, charged with cruelty, that amounted to anything. Then she tried to take his life.

Mr. Sabath: (Counsel for plaintiff.) Well -----

The Court: I am saying to you that I haven't seen a genuine case.

Mr. Sabath: Perhaps your Honor better continue this matter or transfer it to some other chancellor.

The Court: What has that got to do with it?

Mr. Sabath: I don't want your Honor to prejudge -----

The Court: I am not prejudging it. I am just giving you what my experience has been. I will tell you, before you get through you will be in the Court of Domestic Relations, that is where you will be. There are no religious scruples and this woman has been married before, she has been divorced before, this man hasn't been married before. He happens to have a good position. She wants to hook him for the balance of his life. That's all there is to it.

Mr. Vlach: Wait a minute, your Honor, if that is the way your Honor feels, I don't think your Honor should hear this case this morning. * * * I make a motion for change of venue right now.

The Court: I could send you to the west side for making that statement, but I won't. Don't waste any time. We will start right now and hear this case. I said as much about his side as I did about yours. I am just giving you my experience in these cases and giving you the benefit of what has happened during all these years. Now, I still say I am not in favor, unless there are religious scruples, where people are mentally sound of having a woman who has been divorced and a man who has never had but one wife and that is the one whom he was living with, that she should be able to require him for the balance of his life to live in a state of celibacy. I am not in favor of it. That is what I said. In other words, the State under the circumstances becomes <u>particeps criminis</u> unconsciously because of the situation in requiring a person to be in ---- being a party to somebody, litigant, living in an open state of adultery or bad thing. In other words you want this man to be a eunuch for the balance of his life practically, that is what you want."

From the above excerpts, and many others of like character that might be quoted, it is apparent that the court reached a con-

Yes, that is what probably will happen. Here are people, there are no children, I am not so keen on this business of a man being tied up for the balance of his life to a woman. You can go on with your suit if you want to, but, mind you - suppose he makes a case, that I am compelled to give him a divorce. Then where is she?"

Thereafter the following proceedings took place:

"Mr. Vladh: (Counsel for defendant.) Well, then we have had a hearing, your honor, we are through.

The Court: Is that all you want? Is that all you want, just a hearing?

Mr. Vladh: That's all. I don't believe in forcing my client into a divorce, if your honor please, in her present condition.

The Court: All right, go on.

Mr. Vladh: All right.

The Court: Let me see the files. But I will warn you in advance, I am not very keen on this business of granting a man, a physically powerful policeman, a divorce from a frail woman on the ground of cruelty. I am not very keen about it. Never mind, don't tell me what witnesses you have yet, I don't want to hear what witnesses you have yet, but I haven't seen one case in eighteen years of cruelty against a wife, charged with cruelty, that amounted to anything. Then she tried to take his life.

Mr. Babkin: (Counsel for plaintiff.) All -----

The Court: I am saying to you that I haven't seen a genuine case.

Mr. Babkin: Perhaps your honor better continue this matter or transfer it to some other chancellor.

The Court: What has that got to do with it?

Mr. Babkin: I don't want your Honor to prejudge -----

The Court: I am not prejudging it. I am just giving you what my experience has been. I will tell you, before you get through you will be in the Court of Domestic Relations, that is where you will be. There are no religious scruples and this woman has been married before, she has been divorced before, this man hasn't been married before. He happens to have a good position. He wants to look him for the balance of his life. That's all there is to it.

Mr. Vladh: Wait a minute, your Honor, if that is the way your honor feels, I don't think your honor should have this case this morning. * * * I make a motion for change of venue right now.

The Court: I could send you to the Court for making that statement, but I won't. Don't make any else. We will have right now and been this case. I said as much about his case as I did about yours. I am just giving you my experience in these cases and giving you the benefit of what has happened during all these years. Yes, I still say I am not in favor, unless there are religious scruples, where people are morally sound of having a woman who has been divorced and a man who has never had but one wife and that is the one when he was living with, that she should be able to marry him for the balance of his life to live in a state of celibacy. I am not in favor of it. That is what I said. In other words, this, here under the circumstances because religious scrupulous unconscious by because of the situation in requiring a person to be in ---- being a party to somebody, living in an open state of adultery or bad living, in other words you want this man to be a church for the balance of his life practically, that is what you want.

From the above excerpts, and many other such like cases that might be quoted, it is apparent that the court treatment of con-

clusion as to the merits of the complaint and cross-complaint before any evidence was offered. Counsel for plaintiff was advised that in eighteen years of experience the court had not found a "genuine" case of cruelty committed by a wife, and in equally emphatic terms he informed counsel for cross-complainant that he did not believe in separate maintenance.

Inasmuch as both proceedings are sanctioned by law when supported by competent and convincing evidence, it was highly improper for the court to allow his personal views on the subject to prevail in advance of the hearing. Whatever the court's experience over a long period of years may have been in other cases, it is conceivable that the evidence in this case may have been sufficient, on one side or the other, to justify the relief sought. If the court entertained the views expressed, he should have transferred the case to another chancellor, who would have been willing to hear the evidence and determine the issues upon the facts and the law. Although counsel were ultimately permitted to introduce evidence, they did so merely for the purpose of preserving their record, knowing in advance that it was of no avail because the court had so stated. Neither side had a fair trial, nor in fact any such hearing as should be accorded to party litigants.

The judgment of the superior court, dismissing both complaints for want of equity, is reversed and the cause is remanded for new trials for both plaintiff and cross-plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED
FOR NEW TRIALS.

Scanlan, P. J., and Sullivan, J., concur.

ofusion as to the merits of the complaint and cross-complaint before any evidence was offered. Counsel for plaintiff was advised that in eighteen years of [illegible] the [illegible] not found a "genuine" case to actually committed by a wife, and in equally emphatic terms he admonished counsel for cross-complainant that he did not believe in supreme nonsensense.

Inasmuch as both proceedings are constituted by law when supported by competent and convincing evidence, it is highly improper for the court to allow his personal views on the subject to prevail in advance of the hearing. Whatever the court's experience over a long period of years may have been in other cases, it is conceivable that the evidence in this case may have been sufficient, on one hand or the other, to justify the relief sought. If the court entertained the views expressed, he should have transferred the case to another chancellor, who would have been willing to hear the evidence and determine the issues upon its merits and the law. Counsel received very liberally permitted to introduce evidence, they did so [illegible] the purpose of presenting their [illegible]. Having in evidence [illegible] of no avail deprived the court now to object. [illegible] fair trial, nor in fact was such [illegible] by counsel to secure litigants.

The judgment of the chancellor court, dismissing both complaints for want of equity, is reversed and the cause is remanded for new trials for both plaintiff and cross-[illegible].

Judgment reversed and remanded.

W. E. [illegible]

Boardman, P. J., and Williams, J., concur.

38436

ARTHUR GOLDBLATT,
Appellee,

v.

JACKSON K. DERING and
JACKSON K. DERING EXPEDITIONS,
INC.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

284 I.A. 654

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Arthur Goldblatt, an attorney, had judgment in the municipal court for $5,368.19 for legal services alleged to have been rendered for both defendants. Trial was had by jury and judgment entered on the verdict. Defendants appeal.

The first paragraph of plaintiff's statement of claim alleges that he is a licensed attorney and at the instance of Jackson K. Dering furnished legal services to the latter and to Jackson K. Dering Expeditions, Inc., which consisted of the preparation of documents, reports and papers of conferences, legal advice, trips to New York, Washington and Norfolk, examination of title documents to a vessel, preparation of contracts, bills of sale and other documents, appearing before officials of the Bureau of Navigation and before the Collector of Customs in New York and Chicago regarding the registration of a boat named "Uvira," the organization of a corporation, services rendered in a chancery proceeding pending in the superior court of Cook county, services in connection with a claim against an insurance company, and a settlement connected therewith. It is averred that the fair, usual, customary and regular charge for the services so rendered amounted to $5,112.57.

38436

ARTHUR GOLDBLATT,
Appellee,

v.

JACKSON K. DERING and
JACKSON K. DERING CORPORATION,
INC.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

284 I.A. 664

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Arthur Goldblatt, an attorney, had judgment in the municipal court for $2,360.12 for legal services alleged to have been rendered for both defendants. Trial was had by jury and judgment entered on the verdict. Defendants appeal.

The first paragraph of plaintiff's statement of claim allege that he is a licensed attorney and at the instance of Jackson K. Dering furnished legal services to the latter and to Jackson K. Dering Corporation, Inc., which consisted of the preparation of documents, reports and papers of conference, legal advice, trips to New York, conferences and letters, examination of title documents to a vessel, preparation of contracts, bills of sale and other documents, appearing before officials of the Bureau of Navigation and before the Collector of Customs in New York and Chicago regarding the registration of a boat named "Syrian," the organization of a corporation, services rendered in a chancery proceeding pending in the superior court of Cook County, services in connection with a claim against an insurance company, and a settlement connected therewith. It is evident that the fees, usual, customary and regular charge for the services so rendered amounts to $2,114.87.

The second paragraph alleges that Jackson K. Dering Expeditions, Inc., through its agents, organizers and promoters ordered the services rendered, and the third paragraph avers that both defendants requested plaintiff to render the services claimed. The fourth paragraph is based on an account stated between plaintiff and defendants, and the fifth paragraph asks for interest on the amount claimed because of vexatious delay on the part of defendants in paying plaintiff.

By their affidavit of merits defendants averred that the only contact Jackson K. Dering had with plaintiff was while the latter was acting as attorney for the defendant corporation; that Dering had other attorneys during said period; that he did not request plaintiff to render services to the corporation nor retain plaintiff to act as attorney for the corporation or for himself personally. Defendant Jackson K. Dering denied that he ever received a statement of account setting forth any services rendered to him, and that he is not obligated to plaintiff.

Defendants concede that "there is very little dispute as to the facts in the case." Briefly stated the evidence, which consists of some 1150 pages in the record, discloses that in July or August, 1933, plaintiff, a lawyer practicing at the Chicago bar, was called to the office of Jackson K. Dering in the Tower Building to discuss with him certain plans then contemplated by Dering for a trip from New York to the Carribean sea and into the Gulf of Mexico by boat to be charted or purchased by Dering for the purpose of the voyage. A corporation was organized under the laws of this state, known as the Jackson K. Dering Expeditions, Inc., to sponsor the voyage. The boat sailed from New York February 8, 1934, had a mishap in New York harbor, was wrecked outside of Norfolk, Va., and taken to the Norfolk Navy Yards for repairs. It was later returned to Brooklyn, where the ill-fated voyage terminated. Plaintiff claims that he attended to all the legal

The second paragraph alleges that Jackson L. Boring Expeditions, Inc., through its agents, employees and promoters ordered the services rendered, and the third paragraph avers that both defendants requested plaintiff to render the services claimed. The fourth paragraph is based on an account stated between plaintiff and defendants, and the fifth paragraph seeks interest on the amount claimed because of vexatious delay on the part of defendants in paying plaintiff.

By their affidavit of merits defendants averred that the only contact Jackson L. Boring had with plaintiff was while the latter was acting as attorney for the defendant corporation; that Boring had other attorneys during said period; that he did not request plaintiff to render service to the corporation nor retain plaintiff to act as attorney for the corporation or for himself personally. Defendant Jackson L. Boring denied that he ever received a statement of account setting forth any services rendered to him, and that he is not obligated to plaintiff.

Defendants conceded that there is very little dispute as to the facts in the case. [illegible] stated the evidence, which consists of some 1100 pages in the record, disclosed that in July or August, 1955, plaintiff, a lawyer practicing at the Chicago bar, was called to the office of Jackson L. Boring in the Tower Building to discuss with him certain plans then contemplated by Boring for a trip from New York to the Caribbean sea and thence the sale or disposition by boat to be created or purchased by Boring for the purpose of a voyage. A corporation was organized under the laws of Ohio state, known as the Jackson L. Boring Expeditions, Inc., to sponsor the voyage. The boat sailed from New York February 8, 1956, had a mishap in New York harbor, was wrecked outside of Norfolk, Va., and taken to the Norfolk Navy Yards for repairs. It was later towed to Brooklyn, where the ill-fated voyage terminated. Plaintiff claims that he attended to all the legal

details in connection with the expedition, including the organization of a corporation, the preparation of its stock certificates, books and records, had numerous conferences with various parties, made frequent trips to New York, Washington and other places, attended meetings relating to the general affairs of the corporation, prepared contracts drawn with some ten or fifteen employees and the crew, the registration of the boat, legal services in connection with a chancery proceeding instituted in the superior court by one of the parties interested, preparation of claims for insurance covering damages to the boat and the settlement thereof, and many other items of necessary service connected with the details of the expedition. Plaintiff acted as his own counsel, and occupied the witness stand four days. He testified at great length from service sheets prepared and kept in the regular course of his profession as an attorney, as to the various items of service rendered, and introduced in evidence some 186 documents as exhibits.

Defendants urge four points as grounds for reversal.

It is first contended that the court erred in admitting improper evidence on the part of appellee. Counsel complains of the fact that plaintiff testified from his office records instead of relying upon his independent recollection. We think the proof was made in an orderly, legal way. He produced his records and memoranda and from them stated in great detail, item by item, the many services rendered, extending over a period of eight months, totaling 538½ hours. Defendants' objections are all of a general nature, and it is impossible to ascertain specifically the basis of their objections. Many of the documents introduced in evidence by plaintiff were drafted by him, and he so testified. His services embraced a wide variety of legal work. Defendants at no time denied that the papers introduced were drafted by plaintiff, nor did they deny the items or character of the services rendered by him. Graham

details in connection with the expedition, including the organization of a corporation, the procurement of its stock certificates, books and records, had numerous conferences with various parties, made frequent trips to New York, Washington and other places, attended meetings relating to the general affairs of the corporation, prepared contracts drawn with some ten or fifteen employees and the crew, the registration of the boat, legal services in connection with a chancery proceeding instituted in the superior court by one of the parties interested, preparation of claims for insurance covering damages to the boat and the settlement thereof, and many other items of necessary service connected with the details of the expedition. Plaintiff acted as his own counsel, and occupied the attorney about four days. He testifies at great length from service sheets (Exhibit [illegible]) in the regular course of his profession as an attorney, [illegible] the various items of service rendered, and introduced in evidence some 180 documents as exhibits.

Defendants urge four points as grounds for reversal.

It is first contended that the court erred in admitting improper evidence on the part of appellee. Counsel for plaintiff claim of the fact that plaintiff testified from his office books instead of relying upon his independent recollection. In fact the proof was made in an orderly, legal way. He produced his records and memoranda and from them stated in great detail, item by item, the many services rendered, extending over a period of about [illegible] totaling 338½ hours. Defendants' objections are all of a general nature, and it is impossible to ascertain specifically [illegible] of their objections. Many of the documents introduced in various by plaintiff were drafted by him, and so [illegible]. [illegible] embraced a wide variety of legal work. Defendants [illegible] that the papers introduced were drafted by plaintiff, nor did they deny the items or character of the services rendered by him. Judgment

v. Bizner, 28 Ill. App. 269, is cited by defendants to support their first contention, but this case has no application to the controversy. It was a suit in assumpsit to recover on twelve promissory notes. An attempt was there made to vary an unambiguous written agreement by parol evidence, and it was not allowed. The court also refused to admit certain letters written by parties to the suit, as inadmissible, and rejected an offer to introduce in evidence a former contract in writing which was of a different tenor from the agreement on which the suit was predicated.

It is next contended that the court erred in permitting certain hypothetical questions to be propounded to plaintiff's witnesses, and in refusing to admit the hypothetical question asked by defendants. The questionspropounded to plaintiff's witnesses embraced the kind of services performed and called for an opinion as to the fair, reasonable, customary and general charge for the services performed on an hourly and per diem basis. Defendants point out no specific objection to the form of the questions,nor do they suggest any reason why objections thereto should have been sustained. The hypothetical question propounded by defendants to their own witness called for an opinion as to the usual, ordinary and customary value of services "in a case like that, to extend over a period from September 15, 1933, to about the 3rd day of June of the following year - between eight and nine months," and neither embraced the number of hours nor the number of days consumed in the performance of the legal services. It afforded no basis for an opinion. Objection thereto was therefore properly sustained by the court. Levinson v. Sands, 81 Ill. App. 578, is the only case cited by defendants on this point. In that case suit was brought for attorney's fees, and objection was made that the hypothetical question given did not include all the undisputed pertinent facts in the case. No such contention is here made, and the case in our opinion is not in point.

v. Ritner, 32 Ill. App. 469, is cited by defendants to support their first contention, but this case has no application to the controversy. It was a suit in assumpsit to recover on a five promissory notes. An attempt was there made to vary an unambiguous written agreement by parol evidence, and it was not allowed. The court also refused to admit certain letters written by parties to the suit, as inadmissible, and rejected an offer to introduce in evidence a former contract in writing which was of a different tenor from the agreement on which the suit was prosecuted.

It is next contended that the court erred in permitting certain hypothetical questions to be propounded to plaintiff's witnesses, and in refusing to admit the hypothetical question asked by defendants. The questionspropounded to plaintiff's witnesses embraced the kind of services performed and called for an opinion as to the fair, reasonable, customary and general charge for the services performed on an oral and per diem basis. Defendants point out no specific objection to the form of the questions,nor do they suggest any reason why objections thereto should have been sustained. The hypothetical question propounded by defendants to their own witness called for an opinion as to the usual, ordinary and customary value of services "in a case like that, to extend over a period from September 15, 1922, to about the 3rd day of June of the following year - between eight and nine months," and neither embraced the number of hours nor the number of days consumed in the performance of the legal services. It did order no basis for an opinion. Objection thereto was therefore properly sustained by the court. Kinnan v. Sands, 81 Ill. App. 372, is the only case cited by defendants on this point. In that case suit was brought for of counsel fees, and objection was made that the hypothetical question given did not include all the undisputed pertinent facts in the case. No such objection is here made, and the case in our opinion is not in point.

It is next urged that the verdict of the jury was contrary to the evidence. The evidence produced by plaintiff was not contradicted in any way by defendants. Defendants offered one witness, who merely answered questions showing his connection with defendants but he did not deny any of the statements made by plaintiff. In view of the fact that defendants did not introduce any competent testimony going to the merits of the suit, their claim that the verdict was contrary to the evidence is untenable.

Lastly, it is urged that the court erred in refusing to instruct the jury to find the issues in favor of both defendants. Plaintiff introduced competent evidence showing that services had been performed by him for both defendants, and that he had been engaged by both of them to render legal services in connection with the enterprise from which they had received the benefits. The fact that one of the defendants, Jackson K. Dering, transferred certain of his property to the corporation did not tend to relieve either of them from liability. No complaint is made as to the instructions given to the jury under which the issues were clearly defined. Among the questions submitted to the jury were whether plaintiff had been retained by both defendants, whether he had rendered services for them, and the reasonable value of such services.

Although the record is voluminous, the issues in this case are fairly simple. Plaintiff showed conclusively that he had been retained by both defendants, that he had rendered valuable services for them from which they had received the benefits, that he had spent some 538½ hours in connection with the legal details of the enterprise, and that the fair and reasonable value of his services was approximately the amount of the verdict. Defendants offered no evidence in rebuttal on the merits of the case, and in fact Jackson K. Dering was not even present at the hearing, one of the witnesses having stated that he was in Florida. No point is raised

It is next urged that the verdict of the jury was contrary to the evidence. The evidence produced by plaintiff was not contradicted in any way by defendants. Defendants offered one witness, who merely answered questions concerning his connection with defendants but he did not deny any of the statements made by plaintiff. In view of the fact that defendants did not introduce any competent testimony going to the merits of the suit, their claim that the verdict was contrary to the evidence is untenable.

Lastly, it is urged that the court erred in refusing to instruct the jury to find the issues in favor of both defendants. Plaintiff introduced competent evidence showing that services had been performed by him for both defendants, and that he had been engaged by both of them to render legal services in connection with the enterprise from which they had received the benefit. The fact that one of the defendants, Jackson C. Darling, transferred portion of his property to the corporation did not lead to relieve either of them from liability. No question is made as to the instructions given to the jury unless which the issues were clearly defined, among the questions submitted to the jury were whether plaintiff had been retained by both defendants, whether he had rendered services for them, and the reasonable value of such services.

Although the record is voluminous, the issues in this case are fairly simple. Plaintiff claims to be entirely free from the had been retained by both defendants, that he had rendered valuable services for them from which they had received a benefit, that he had spent some 3000 hours in connection with the legal affairs of the enterprise, and that the just and reasonable value of his services was approximately the amount of the verdict. Defendants offered no evidence in rebuttal in the matter of the case, but in fact Jackson C. Darling was not even present at the hearing, one of the witnesses having stated that he was in Florida. No point is raised

as to the amount of the verdict. Under the circumstances we do not understand how the jury could well have arrived at any other verdict. The contentions made by defendants are not convincing for reversal, and the judgment of the municipal court is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

as to the amount of the verdict. Under the circumstances we do not understand how the jury could have arrived at any other verdict. The conclusions made by defendants are not convincing for reversal, and the judgment of the municipal court is therefore affirmed.

.....

Boardman, P. J., and Gutierrez, J., concur.

38509

LYDA GLENN VAN DOREN,
Appellee,

v.

OAK PARK TRUST & SAVINGS BANK,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

284 I.A. 654[3]

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover real estate commissions under an implied contract with defendant. The cause was tried by the court without a jury resulting in findings and judgment for $650 and costs in favor of plaintiff. Defendant has appealed.

The complaint alleges that on or about October 20, 1934, plaintiff was engaged by defendant to procure a purchaser for certain premises situated at 1132 North Oak Park avenue, in Oak Park, Illinois, and that defendant agreed to pay her a regular real estate broker's commission therefor; that about February 16, 1935, she secured one Joseph A. Nolan as a purchaser for the premises but that defendant informed her it would not accept Nolan and thereafter without her knowledge sold the premises to Nolan for $16,000, by reason whereof defendant became obligated to pay her the regular real estate broker's commission on the sale, amounting to $800.

Defendant's answer denied that it had engaged plaintiff as a real estate broker to sell the premises in question, or that it had listed the property with plaintiff for sale or agreed to pay her a real estate commission for the sale thereof, and averred that on December 3, 1934, plaintiff submitted to it a contract signed by one Joseph A. Nolan to purchase the premises

LYDIA GLENN VAN DOREN, Appellee,	
v.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
OAK PARK TRUST & SAVINGS BANK, Appellant.	

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover real estate commissions under an implied contract with defendant. The cause was tried by the court without a jury resulting in findings and judgment for $650 and costs in favor of plaintiff. Defendant has appealed.

The complaint alleges that on or about October 20, 1924, plaintiff was engaged by defendant to procure a purchaser for certain premises situated at 111. North Oak Park avenue, in Oak Park, Illinois, and that defendant agreed to pay her a regular real estate broker's commission therefor; that about February 16, 1925, she secured one Joseph C. Nolan as a purchaser for the premises but that defendant informed her it would not accept Nolan and thereafter without her knowledge sold the premises to Nolan for $16,000, by reason whereof defendant became obligated to pay her the regular real estate broker's commission on the sale, amounting to $800.

Defendant's answer denied that it had engaged plaintiff as a real estate broker to sell the premises in question, or that it had listed the property with plaintiff for sale or agreed to pay her a real estate commission for the sale thereof, and averred that on December 3, 1924, plaintiff [illegible] to it a contract signed by one Joseph C. Nolan to purchase the premises

for $11,000, which defendant rejected December 6, 1934; that thereupon plaintiff advised Nolan that she was through with the bank (defendant) and its way of doing business and would have nothing more to do with it, and also advised Nolan not to do any business with the bank; that thereafter Nolan's wife submitted a contract to defendant for the purchase of the premises at $15,000, which defendant accepted.

It appears from the evidence that plaintiff had been a real estate broker in Oak Park for some thirteen years. This was evidently known to defendant, for on at least one occasion plaintiff had negotiated a lease on behalf of the bank for one of its properties. In September, 1934, plaintiff asked Fred Johns, vice president and trust officer of the bank, for listings of the properties that they were trying to liquidate. Johns told her that the bank would be glad to let her have a list of these properties, and suggested that she see Mr. Seftenberg, then in charge of properties for the bank. Seftenberg in turn referred plaintiff to Mr. Drummond, who advised her that a list of all properties was being prepared and would be sent to real estate brokers in Oak Park and that when it was completed she could have one of the lists. In October, 1934, one Mrs. Henkel, a sales lady employed by plaintiff, telephoned Drummond and advised him that she had a customer from LaGrange who contemplated buying a home for a sum not to exceed $13,000, and asked Drummond whether the bank had any properties that could be delivered at that price. Drummond denies that any price was mentioned, but it is conceded that he gave Mrs. Henkel four or five properties, including the one in question, which were thereupon recorded in plaintiff's book as being listed by the bank. One Tope, another of plaintiff's employees, then came to the bank and took down the description of the premises in question, together with other properties submitted.

for $11,000, which defendant rejected (December 6, 1934) that there-upon plaintiff advised Nolan that she was through with the bank (defendant) and its way of doing business and would have nothing more to do with it, and also advised Nolan not to do any business with the bank; that thereafter Nolan's wife submitted a contract to defendant for the purchase of the premises at $12,000, which defendant accepted.

It appears from the evidence that plaintiff had been a real estate broker in Oak Park for some thirteen years. This was evidently known to defendant, for on at least one occasion plaintiff had negotiated a loan on behalf of the bank on one of its properties. In September, 1934, plaintiff saw Ted Johns, vice president and trust officer of the bank, for listings of the properties that they were trying to liquidate. Johns told her that the bank would be glad to let her have a list of those properties, and suggested that she see Mr. Seltenberg, then in charge of properties for the bank. Seltenberg in turn referred plaintiff to Mr. Drummond, who advised her that a list of all properties was being prepared and would be sent to real estate brokers in Oak Park and that when it was completed she could have one of the lists. In October, 1934, one Mrs. Dunkel, a middle lady employed by plaintiff, telephoned Drummond and advised him that she had a customer from Kansas who contemplated buying a home for a sum not to exceed $10,000, and asked Drummond whether the bank had any properties that could be delivered at that price. Drummond denies that any price was mentioned, but it is undisputed that he gave Mrs. Dunkel four or five properties, including the one in question, which were thereupon recorded in plaintiff's book as being listed by the bank. One day, another of plaintiff's employees, then came to the bank and took down the description of the premises in question, together with other properties mentioned.

Shortly thereafter plaintiff placed an advertisement im Oak Leaves, a magazine published in Oak Park, for three successive weeks, ending November 29, 1934. While the advertisements appeared in the magazine, a Mrs. Nolan telephoned plaintiff's office and talked to Mrs. Henkel, who took her and Mr. Nolan around to various properties, including the premises involved. The Nolans became interested, and shortly thereafter met at plaintiff's office, where a written contract for the purchase of the property was prepared, and Nolan made a deposit of $500 with plaintiff. The agreement provided for the purchase of the property for $13,000, $8,000 of which was represented by a first mortgage, and the agreement contained a provision that the sellers were to pay the broker's commission. The contract was then submitted to the bank, and within a week the bank advised plaintiff that the purchase price stipulated in the agreement was not sufficient. Plaintiff thereupon again contacted the Nolans, advised them that the bank had rejected the offer, returned their check and requested Mr. Nolan to raise his offer, suggesting that she thought they could get the property for $2,000 or $3,000 more. Nolan said that he did not care to raise his offer at the time, but would think it over. Mrs. Henkel testified that she contacted the Nolans frequently thereafter, calling them on the telephone about once a week, seeking to induce them to purchase the property. Mrs. Nolan denied frequent conversations, but admitted that Mrs. Henkel called her on two occasions and was told that the Nolans were not interested. Mr. Nolan testified that when plaintiff returned his check, after the written contract was rejected by the bank, plaintiff did not ask him to make another offer but stated that she was through with the bank and its way of doing business.

In the early part of February, 1935, Mrs. Nolan went to see Mr. Denny, president of the bank, stating that she had been sent

shortly thereafter plaintiff placed an advertisement in the Daily, a magazine published in the Bronx, for three successive weeks, ending November 24, 1954. While the advertisements appeared in the magazine, a Mrs. Nolan telephoned plaintiff's office and talked to Irene, Lenfol, who took her and Mr. Nolan around to various properties, including the premises involved. The Nolans became interested, and shortly thereafter met at plaintiff's office, where a written contract for the purchase of the property was prepared, and Nolan made a deposit of $500 with plaintiff. The agreement provided for the purchase of the property for $12,000, $8,000 of which was represented by a first mortgage, and the agreement contained a provision that the sellers were to pay the broker's commission. The contract was then submitted to the bank, and within a week the bank advised plaintiff that the purchase price stipulated in the agreement was not sufficient. Plaintiff's salesman again contacted the Nolans, advised them that the bank had rejected the offer, returned their check and requested Mr. Nolan to raise his offer, suggesting that she thought they could get the property for $8,000 or $9,000 more. Nolan said that he could not come to raise his offer at the time, but would call later. Mrs. Lenfol testified that she contacted the Nolans frequently thereafter, calling them on the telephone about once a week, seeking to induce them to purchase the property. Mrs. Nolan denied frequent conversations, but admitted that Mrs. Lenfol called her on two occasions and told that the Nolans were not interested. Mr. Nolan testified that upon plaintiff returned his check, [illegible] the bank, plaintiff did not ask him to make another offer, but he [illegible] that she was thoroughly with the bank and it [illegible] believe.

In the early part of February, 1955, Mr. Nolan met Mr. Lenfol, who idea of the bank, stating that [illegible]

there by a friend of his, and inquired whether they had any properties for sale. Denny referred her to Drummond, who gave her a list of five or six properties. The Nolans selected the property in question, prepared their contract for the purchase of same for the sum of $15,000, and submitted it to the bank. This contract was accepted and the transaction was closed in February, 1935. Upon learning of the sale to the Nolans plaintiff demanded of defendant the payment of a commission, which was refused, and suit followed.

Defendant urges two major grounds for reversal: (1) that there was no employment of the plaintiff by defendant, and (2) that there was an abandonment of the negotiations by both plaintiff and the purchaser, the Nolans. With reference to the first contention it is conceded that there was no express agreement between plaintiff and defendant. Plaintiff, however, seeks to recover upon the theory of an implied contract, claiming that there was an employment of plaintiff as a broker to sell such of the bank properties as she could, that she found the purchaser who eventually bought the premises in question, disclosed the identity of the purchaser to defendant, was the procuring cause of the sale and never abandoned her efforts to sell the property to Nolan until the sale had been consummated between the bank and the Nolans.

Unquestionably plaintiff found and presented to the bank the purchaser to whom it eventually sold the property. The premises in question were submitted to plaintiff by the bank for listing, and since the bank undoubtedly knew that plaintiff was a licensed real estate broker it cannot fairly be contended that she was a mere volunteer. In the light of the testimony offered by plaintiff, the bank was undoubtedly desirous of having her dispose of certain of their properties, if she could, and impliedly authorized her to procure purchasers therefor. In pursuance of this implied agreement

there by a friend of his, and inquired whether they had any properties for sale. Mary referred her to Swenson, who gave her a list of five or six properties. The Adams solicited the property in question, prepared their contract for the purchase of same for the sum of $13,000, and mailed it to the bank. This contract was accepted and the transaction was closed in February, 1932. Upon learning of the sale to the Adams plaintiff demanded of defendant the payment of a commission, which was refused, and suit followed.

Defendant urges two major grounds for reversal: (1) that there was no employment of the plaintiff by defendant, and (2) that there was an abandonment of the negotiations by both plaintiff and the purchaser, the Adams. In reference to the first contention it is conceded that there was no express agreement between plaintiff and defendant. Plaintiff, however, seeks to recover upon the theory of an implied contract, claiming that there was an employment of plaintiff as a broker to sell such of the bank properties as the court, that we found the evidence to show that brought the premises in question, realized the identity of the purchaser to defendant, and the price in regard of [illegible] abandoned her efforts to sell the property to Tolan and it was not brought consummated between the bank and the Adams.

Depositions showed that [illegible] to the bank the purchaser to whom it eventually sold the property. The premises in question were submitted to plaintiff by the bank for listing, and since the bank [illegible] real estate broker it could [illegible] volunteer. In the light of the testimony offered by plaintiff, the bank was undoubtedly desirous of having her dispose of certain of their properties, if she could, and impliedly authorized her to procure purchasers therefor. In pursuance of this implied agreement

she advertised for purchasers for the properties listed with her by the bank and contacted the Nolans. The agreement prepared by plaintiff and submitted to the bank contained a provision that the seller was to pay the broker's commission. Drummond testified that he did not examine the contract, but it was in his possession for a considerable time and the court may well have concluded that he was familiar with its contents. The bank rejected the agreement because of inadequacy of the price, and, so far as the record discloses, for no other reason. After plaintiff contacted the Nolans they viewed the property together with Mrs. Henkel, who testified that she secured the name of the tenants occupying the premises from Mr. Drummond. Except for these visits with plaintiff, the Nolans never again entered the property until after they purchased it. Under the circumstances we think the evidence establishes an implied contract between the bank and plaintiff under which she did all that she was required to earn a commission. In Rigdon v. More, 226 Ill. 382, it was said (386):

> "The evidence shows the owner of the property and the purchaser were brought together, not personally but in the negotiations which led to an examination of the building and ultimately to its purchase, by plaintiff in error. * * *
>
> "We think the evidence makes a prima facie case of the employment by Strong of plaintiff in error, as a broker, to sell the real estate mentioned. Through the efforts of plaintiff in error negotiations for the sale by the purchaser were brought about, and these negotiations continued until the sale was consummated."

Defendant seeks to distinguish the Rigdon case by showing that there existed an oral agreement for employment, but on principle there would be no distinction between the cases if the evidence warrants the conclusion that there was an implied contract. In the Rigdon case the court cites Hafner v. Herron, 165 Ill. 242, which in apt language states the rule that we think applicable to these proceedings:

> "Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner

she advertised for purchasers for the properties listed with her by the bank, and entered into follows. The agreement prepared by plaintiff and submitted to the bank contained a provision that the seller was to pay the broker's commission. Thompson testified that he did not examine the contract, but it was in his possession for a considerable time and the court may well have concluded that he was familiar with its contents. The bank rejected the agreement because of inadequacy of the price, and, in fact as the records disclose, for no other reason. After plaintiff contacted the Williams they visited the property together with Mrs. Gunnell, who testified that she secured the name of the company according she learned from Mr. Drummond. Except for these visits with plaintiff, the Williams never again entered the property until after they purchased it. Under the circumstances as fairly shown, reference establishes an implied contract between the bank and plaintiff under which she did all that she was required to earn a commission. In Lydon v. Jones, 290 Ill. 322, it was said (328):

> "The evidence shows the owner of the property and the purchaser were brought together, not through the agency of the negotiations which led to the execution of the building and ultimately to the purchase, by plaintiff in error. . . .
>
> "We think . . . cannot make a prima facie case of the employment by strong of plaintiff in error, as a broker, to sell the real estate mentioned. Upon the efforts of plaintiff in error negotiations for the sale of the premises . . . on his behalf, and these negotiations continued until . . . it was not consummated."

Defendant seeks to distinguish the Lydon case on the ground that there existed an oral agreement for commission, but in Philadelphia there would be no distinction between the rights of the parties where warranto the conclusion that there is implied contract. In the Lydon case the court cited Palmer v. Carson, 147 Ill. 247, which in our language states the rule that is applicable to these proceedings:

> "Yet it is always necessary that the surrounding circumstances should be carefully introduced to the owner by the broker, providing a foundation affirmatively that the purchaser was induced to apply to the owner

through the instrumentality of the broker or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. * * * It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions." (Italics ours.)

Defendant cites several cases purporting to hold that giving to Mrs. Henkel the description of the property did not create a contract of employment. In each of the cases cited there was but a single transaction between the parties. In this proceeding there had been previous dealings, however limited, and circumstances showing that the bank acceded to plaintiff's request for a listing of several of its properties with the avowed intention on the part of the seller to have plaintiff dispose of them if she could. These circumstances indicate an implied agreement on the part of the bank to pay plaintiff, whom the bank knew to be a licensed real estate broker, the regular commissions in the event of sale. The fact that plaintiff did not actually consummate the sale should not operate to deprive her of a commission, for she found a buyer ready, willing and able to purchase, who ultimately bought the property from the bank, even though at a higher figure. Under the authority of Hafner v. Herron, supra, the fact that the seller consummated the sale upon different terms than those proposed by plaintiff would not deprive her of her right to a commission.

The other ground urged is that there was an abandonment of the negotiations on the part of plaintiff with the Nolans. This is entirely a question of fact upon which the court found adversely to defendant. Mrs. Henkel testified that subsequent to the rejection of Nolan's first offer, in December, 1934, she called either Mr. or Mrs. Nolan on the telephone regularly until February or March, 1935, when she learned that the property had been sold. In these various conversations she sought to persuade the Nolans to raise their offer. The court evidently believed this testimony, and we think the evidence justifies the conclusion that there was no abandonment by plaintiff.

through the instrumentality of the broker or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. * * * It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commission." (Italics ours.)

Defendant cites several cases purporting to hold that giving to Mrs. Kendal the description of the property did not create a contract of employment. In each of the cases cited there was but a single transaction between the parties. In this proceeding there had been previous dealings, however limited, and circumstances showing that the bank acceded to plaintiff's request for a listing of several of its properties with the vague intention on the part of the seller to have plaintiff dispose of them if she could. These circumstances indicate an implied agreement on the part of the bank to pay plaintiff, whom the bank knew to be a licensed real estate broker, the regular commissions in the event of sale. The fact that plaintiff did not actually consummate the sale should not operate to deprive her of a commission, for she found a buyer ready, willing and able to purchase, who ultimately bought the property from the bank, even though at a higher figure. Under the authority of Hutner v. Harrison, supra, the fact that the seller consummated the sale upon different terms than those proposed by plaintiff would not deprive her of her right to a commission.

The other ground urged is that there was an abandonment of the negotiations on the part of plaintiff with Mrs. Polan. This is entirely a question of fact upon which the court found adversely to defendant. Mrs. Kendal testified that subsequent to the rejection of Polan's first offer, in December, 1944, she called Mr. or Mrs. Polan on the telephone repeatedly until Feb. 1945, at which, when she learned that the property had been sold. In these various conversations she sought to persuade the Polans to make their offer. The court evidently believed this testimony, and so did the evidence justifies the conclusion that there was no abandonment by plaintiff.

Evidently the Nolans, for some reason not disclosed in the record, preferred to deal with the bank direct, but their course of action, according to the evidence, was not due to the abandonment of the negotiations by plaintiff.

Lastly, it is urged by defendant that there is a variance between the pleadings and proof, in that plaintiff sued defendant individually, whereas the evidence on the hearing disclosed that the property involved was held by the bank as trustee. The question was not raised at the trial, and it is too late to raise it for the first time on appeal. (Carney v. Marquette Coal Mining Co., 260 Ill. 220; Illinois Life Ass'n v. Wells, 200 Ill. 445; Central Ill. Const. Co. v. Lloyd, 134 Ill. App. 494.)

For the reasons herein stated, we are of the opinion that the judgment of the Superior court should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

Evidently the Solons, for some reason not disclosed in the record, preferred to deal with the case direct, but their course of action, according to the evidence, was not due to the abandonment of the negotiations by plaintiff.

Lastly, it is urged by defendant that there is a variance between the pleadings and proof, in that plaintiff's sued defendant individually, whereas the evidence on the hearing disclosed that the property involved was held by the bank as trustee. The question was not raised at the trial, and it is too late to raise it for the first time on appeal. (Downey v. Hoquiatte Coal Mining Co., 209 Ill. 220; Illinois Life Ass'n v. Wills, 200 Ill. 449; Central Ill. Const. Co. v. Lloyd, 154 Ill. App. 494.)

For the reasons herein stated, we are of the opinion that the judgment of the superior court should be affirmed, and it is so ordered.

Affirmed.

Scanlan, P. J., and Gallivan, J., concur.

74 A

38251

ROCK-ROAD CONSTRUCTION CO., a corporation, Appellee,	APPEAL FROM SUPERIOR
v.	COURT, COOK COUNTY.
SIDNEY L. ZIMMERMAN, Appellant.	284 I.A. 654[4]

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant, Sidney L. Zimmerman, seeks to reverse a judgment for $450.24 entered against him in favor of plaintiff, Rock-Road Construction Company, in an action tried by the court without a jury.

Plaintiff's declaration filed November 27, 1931, alleged that an oral agreement was entered into between the parties whereby defendant agreed to pay plaintiff the stipulated sum of $450.24 for resurfacing the street abutting defendant's property. The parties agree in their briefs that the only issue in this case is, "Did defendant orally employ plaintiff to resurface (pave) the street abutting his property at an agreed price of $450.24?"

Plaintiff was engaged in business as a private paving contractor. It solicited all the property owners on Throop street between 103rd and 104th streets, Chicago, for permission to resurface that street and for written contracts covering such work at stipulated prices based on the property's "frontage" or "sideage." All the property owners in the block signed written contracts for the paving, except defendant. Defendant's property was located at the southeast corner of 103rd and Throop streets, fronting on

38251

ROCK-ROAD CONSTRUCTION CO.,
a corporation,
Appellee,

v.

SIDNEY E. ZIMMERMAN,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

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Plaintiff was engaged in business as a private paving contractor. It solicited all the property owners on Thorndon street between 103rd and 104th streets, Chicago, for permission to resurface that street and for written contracts covering such work at stipulated prices based on the property's "frontage" or "width." All the property owners in the block signed written contracts for the paving, except defendant. Defendant's property was located at the southeast corner of 103rd and Thorndon streets, fronting on

103rd street, with its depth of 134 feet or what is known in paving parlance as "sideage" abutting Throop street. Plaintiff resurfaced the entire block, including that portion of the street contiguous to defendant's property and defendant refuses to pay, claiming that he did not employ plaintiff to do such paving.

Chester Rant, assistant secretary of plaintiff corporation, after stating that he visited defendant in April, 1930, at his place of employment, 1031 E. 63rd street, and that no one else was present, testified:

"Well I came into the establishment and I asked for Mr. Zimmerman and he said, 'I am Mr. Zimmerman.' I told him I was a representative of the Rock-Road Construction Company and the credit manager and that property owners on Throop street wanted the street resurfaced and they have all signed up and I said that the only signature lacking on this spread in the contract was his and in order to make it a hundred per cent I asked him whether he wouldn't want to sign it up with the rest of the property owners in a private contract. 'Well,' he said, 'improving the street - that costs money.' 'Well,' I said, 'Yes, it does, but the street is in bad condition.' Well, we discussed that pro and con and he wanted to know the price. I told him that under our system of streets the property owners pay $5.60 a front foot, but his property fronting on 103rd Street and sideage on the street that was going to be improved ran alongside the property that would be forty per cent less or $3.36 a foot. I said with the amount of feet he had there it would be $450.24. * * *

"After the price was discussed and he admitted that the improvement should be put in the street and the property owners would be able to get a chance to sell the property up there if the street was improved, that we should go ahead with the work and I said, 'Let us go ahead and make it a hundred per cent contract and you sign the contract, Mr. Zimmerman,' and he said, 'All right.' And he picked up the contract, and 'Before I sign it,' he said, 'I want to read it over. I am a business man and I don't sign anything before I read it over.' * * *

"'Well,' he says, 'I told you I don't like to sign this contract here because there is a judgment clause in it.' He said, 'You fellows can go out and take a judgment tomorrow before the work is finished. That is not good business.' I said, 'Well, of course, you are in business. You have your reasons for it. If you don't want to sign a contract sign a petition that you will go along with us and pay for the street when it is finished.' He said, 'That is more like it, and when the street is in I will pay for it.'"

Rant further testified that on that occasion defendant, after employing plaintiff signed the following petition:

"PETITION
TO COMMISSIONER OF PUBLIC WORKS
OF THE CITY OF CHICAGO.

1032d street, with the depth of 125 feet on what is known in paving parlance as "sidewalk substitute" Turner street. Plaintiff resurfaced the entire block, including that portion of the street contiguous to defendant's property and referred defendant refused to pay, claiming that he did not employ plaintiff to do such paving.

Chester Hunt, assistant secretary of plaintiff corporation, after stating that he visited defendant in April, 1926, at his place of employment, 1021 W. 63rd street, and that he was the person, testified:

"Well I came into the establishment and I asked for Mr. Zimmerman and he said, 'I am Mr. Zimmerman.' I told him I was a representative of the York-Hood Construction Company and the credit manager and that property owners on Throop street wanted the street resurfaced and they have all signed up and I said that the only signature lacking on this agreement in the contract was his and in order to make it a bundle of pa- cent I asked him whether he would not to sign it so with the rest of the property owners in a private contract. 'Well,' he said, 'improving the street - that costs money.' 'Well,' I said, 'Yes, it does, but the street is in bad condition.' 'Well, we discussed that pro and con. He wanted a more the price. I told him that under our system of streets the property owners pay $3.00 a front foot, but his property fronting on 63rd street and alleys on the street that was going to be improved can alongside the property that would be forty per cent less or $2.50 a foot. I said with the amount of feet he had there it would be $450.24. * * *

"After the price was discussed and he admitted that the improvement should be put in the street and the property owners would be able to pay a number of mill the property up there if the street was improved, that it would pay him with the work and I said, 'Let us go ahead and make it a bundred per cent contract and you sign the contract, Mr. Zimmerman,' and he said, 'All right.' And he picked up the contract, and 'Before I sign it,' he said, 'I want to read it over.' I am a business man and I don't sign anything before I read it over.' * * *

"'Well,' he says, 'I hold you to' - like to sign this contract here because there is a judgment clause in it.' He said, 'You fellows can go out and take a judgment against some the work is finished. That is not good business.' I said, 'Well, of course, you are in business. You have your business to do. If you don't want to sign a contract sign a petition ok & you will go along with us and pay up the money when it is 'fini- ' He said, 'That is more like it, and when the street is in I will pay for it.'"

Hunt further testified that on that occasion defendant,

after employing plaintiff signed the following petition:

"PETITION
TO COMMISSIONER OF PUBLIC WORK
OF THE CITY OF CHICAGO.

We, the undersigned, owners or authorized agents of property abutting Throop St. from 103rd to 104th St. have entered into a contract with the ROCK-ROAD CONSTRUCTION COMPANY to resurface with an asphalt wearing surface the existing old macadam roadway, in accordance with the attached specifications, to be paid for by the undersigned.

Date	Name	Residence	Lot No.	Frontage
	Charles Strumil	1301 W. 103 St.		134 ft.
	Chas. Wolters	10331 Throop St.		50 ft.
	Anna Wolters			
	Alexander Fraatz	9150 S. State St.	5-6-8	150 ft.
	Estate of Alexander B. Stevens, Jessie C. Stevens	10357 Throop St.		
	Geo. A. Schneider	10317 Throop Str.		
	Lilly Schneider	10317 Throop Str.	9 and 10	50 ft.
	Caroline Kieffer	10343 Throop Street		
	Frank Kieffer	10343 Throop Street	15	50 ft.
	Herman Rodnix	10321 Throop Street	11, 12	Fift
	Augusta Rodnix			
	Anna Fritze	10327 Throop Street	13	39½ ft.
	F. Peetz	10337 Throop Street	14	50 ft.
	Sidney L. Zimmerman	1031 E. 83rd St.		134 ft.

ROCK-ROAD CONSTRUCTION COMPANY
SPECIFICATIONS
FOR RESURFACING STREET
WE PROPOSE TO REBUILD AND RESURFACE:
Throop St. from 103rd to 104th St." (Italics ours.)

Attached to and forming part of the petition were specifications covering the extent, nature and character of the work to be performed by plaintiff, as well as the unit price a "sideage" foot and "frontage" foot.

Defendant denied that he had ever had any dealings with plaintiff's witness Rant. He testified that he was approached on the proposition of resurfacing the block in question only once and then by two men, one of whom was Charles Strumil, a property owner in the block, and the other a man he did not know. He testified further as follows:

"Well, these two men came in to tell me that the street should be paved or rather that the street was going to be paved by the city, and that if they did it under a private contract it wouldn't cost so much or something like that. 'Well,' I says, 'I didn't think the street needed paving at all, as far as I could see. I hadn't seen the place for a long time but I would go out to take a look at it.' 'Well,' they said, 'It is important to have a petition signed to stop the city from paving that street.' 'Then,' he says, 'we will get together on the

We, the undersigned, owners or authorized agents of property abutting Throop St. from 102nd to 104th St. have entered into a contract with the ROCK-ROAD CONSTRUCTION COMPANY to resurface with an asphalt wearing surface the existing old macadam roadway, in accordance with the attached specifications, to be paid for by the undersigned.

Date	Name	Residence	Lot No.	Frontage
	Charles Stumpf	1201 W. 105 St.		154 ft.
	Chas. Wolters	10351 Throop St.		50 ft.
	Anna Wolters			
	Alexander Frank	1120 S. State St.	5-6-8	150 ft.
	Estate of Alexander	10357 Throop St.		
	B. Stevens, Jessie			
	C. Stevens			
	Geo. A. Schmeider	10317 Throop St.		
	Lilly Schmeider	10317 Throop St.	4 and 10	50 ft.
	Carolina Kiefer	10343 Throop Street		
	Frank Kiefer	10343 Throop Street	13	50 ft.
	Herman Rodnis	10321 Throop Street	11, 12	Fifty
	Augusta Rodnis			
	Anna Fritze	10327 Throop Street	13	39½ ft.
	X. Peets	10337 Throop Street	14	50 ft.
	Sidney E. Zimmerman	1021 E. 83rd St.		154 ft.

ROCK-ROAD CONSTRUCTION COMPANY
SPECIFICATIONS
FOR RESURFACING STREET
WE AGREE TO RESURFACE AND MAINTAIN:
Throop St. from 102nd to 104th St." (Italics ours.)

Attached to and forming part of the petition were specifications covering the extent, nature and character of the work to be performed by plaintiff, as well as the unit price a "sideage" foot and "frontage" foot.

Defendant denied that he had ever had any dealings with plaintiff's witness Hart. He testified that he was approached on the proposition of resurfacing the block in question only once and then by two men, one of whom was Charles Stumpf, a property owner in the block, and the other a man he did not know. He testified further as follows:

"Well, these two men came in to tell me that the street should be paved or rather that the street was going to be paved by the city, and that if they did it under a private contract it wouldn't cost so much or something like that. 'Well,' I says, 'I didn't think the street needed paving at all, so far as I could see. I hadn't been the place for a long time but I would go out to take a look at it.' 'Well,' they said, 'it is important to have a petition signed to stop the city from paving that street.' 'Then,' he says, 'we will get together on the

contract for us to do the job.' 'Well,' I says, 'that sounds fairly well.' I says, 'I suppose if you insist upon having that done now I thought I ought to go down to see the street first.' He says, 'That won't be necessary, we want to get this signed as soon as possible.' I said, 'All right, I will sign the objection for the city doing the paving now, and you can see me when the time comes and we can go down to look it over,' and in the meantime it seems to me it looked O. K. * * *

"I signed this paper at that time and these people never came back to see me again until the street was completed. Then they sent me a bill and says that the job was done and here is your bill, and I didn't have any idea how much it was going to cost before that or whether they were going to do the job or not."

Mrs. Pearl Schoen testified in defendant's behalf that while the property involved was in defendant's name she owned a 5/8ths interest in same; that Strumil and another man, who said he represented plaintiff, came into her store when her brother-in-law, Sam Gill, was present, to discuss the resurfacing of Throop street; that she sent Gill for defendant; that she told them "I do not want the street paved because I do not think it needed it;" that when defendant arrived he told them the same thing; that Strumil requested her and defendant to "sign this petition for the city not to pave the street" because plaintiff would do it at less cost to the property owners; that defendant on that occasion did not "tell anybody to go ahead and pave the street;" and that after she and defendant considered the matter he signed the petition "for the city not to pave the street." Her brother-in-law, Gill, testified to substantially the same effect.

It is unquestionably the law that even though plaintiff resurfaced this block on Throop street and defendant's property received the benefit of such resurfacing, that fact alone will not raise an implied obligation on defendant's part to pay plaintiff for its work and labor. The law never implies a promise to pay for a trespass, nor can a party force another to become his debtor by performing labor for him against his will or without his assent. (City of Alton v. Mulledy et al., 21 Ill. 76.)

contract for us to do the job.' 'Well,' I says, 'that sounds fairly well.' I says, 'I suppose if you insist upon having that done now I thought I ought to go down to see the street first.' He says, 'That won't be necessary, we want to get this signed as soon as possible.' I said, 'All right, I will sign the objection for the city doing the paving now, and you can see me when the time comes and we can go down to look it over,' and in the meantime it seems to me it looked O. K. * * *

"I signed this paper at that time and these people never came back to see me again until the street was completed. Then they went me a bill and says that the job was done and here is your bill, and I didn't have any idea how much it was going to cost before that or whether they were going to do the job or not."

Mrs. Carl Olsen testified in defendant's behalf that while the property involved was in defendant's name she owned a 3/8ths interest in same; that Strumil and another man, who said he represented plaintiff, came into her store when her brother-in-law, Sam Gill, was present, to discuss the resurfacing of Throop street; that she sent Gill for defendant; that he told them "I do not want the street paved because I do not think it needed it;" that when defendant arrived he told them the same thing; that Strumil requested her and defendant to "sign this petition for the city not to pave the street" because plaintiff would do it at less cost to the property owners; that defendant on that occasion did not "tell anybody to go ahead and pave the street;" and that after she and defendant considered the matter he signed the petition "for the city not to pave the street." Her brother-in-law, Gill, testified to substantially the same effect.

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However, plaintiff does not rely on an implied obligation of defendant to pay for this work because he received the benefit of it, but rather upon Zimmerman's express authorization to it to do the work. As to whether or not defendant agreed orally to employ plaintiff to do this resurfacing work the evidence is in sharp conflict, but it conclusively appears that the petition heretofore set forth is the only petition signed by defendant. The occasion when and the circumstances under which this petition was signed are seriously disputed, but, regardless of when it was signed by defendant or under what circumstances, it will be noted that it contains the recital, "We the undersigned, owners or authorized agents of property abutting Throop St. from 103rd to 104th St. have entered into a contract with the Rock-Road Construction Company to resurface * * * the old macadam roadway * * * to be paid for by the undersigned." It is not claimed that this petition constituted a contract for the paving of the street, but it is claimed that it constituted a written admission that defendant had theretofore employed plaintiff to do this work. In view of the directly contradictory statements of the witnesses for the parties as to what had actually transpired, defendant's acknowledged signature to this written admission that he had "entered into a contract" was sufficient to turn the scales in plaintiff's favor and resolve any doubt that the court may otherwise have entertained.

It is urged that plaintiff did not prove its case by a preponderance of the evidence and it is suggested that the trial court capriciously disregarded the fact that a larger number of witnesses testified for defendant than in plaintiff's behalf. It has repeatedly been held that the question of the preponderance of the evidence does not arise at all in this court and that we can only disturb the finding of the trial court when it is clearly

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against the manifest weight of the evidence. Discussing this question in Mills & Co. v. Duke, 232 Ill. App. 277, this court said at p. 280:

"Under the law this court cannot disturb the verdict of a jury unless it is clearly against the manifest weight of the evidence. The question of the preponderance of the evidence does not arise at all in this court. There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review. This being the law, of course, we cannot disturb the verdict of the jury in the instant case."

The evidence was conflicting and it was the duty of the trial court to determine the issues of fact. The trial judge saw and heard the witnesses, and, in view of his much more advantageous opportunity of determining their credibility, it would conform to no principle of law with which we are familiar to substitute our judgment for his on the conflicting evidence presented. The mere fact that a greater number of witnesses were called by defendant than by plaintiff is not of itself sufficient to cause us to set aside the verdict as being against the manifest weight of the evidence. Considering this question in Bowers v. Heflebower, 243 Ill. App. 129, where it refused to reverse the judgment for plaintiff, whose case rested solely upon his own testimony and was contradicted by three witnesses for the defense, the court said at p. 135:

"The one witness may be supported by the facts and circumstances in the case to such an extent that his testimony induces a belief that it is reasonable and probable, while that of the other witnesses does not produce such a belief. The weight of the testimony is for the jury. They have no right to arbitrarily disregard the testimony of unimpeached witnesses, yet they are to consider such testimony in connection with all the facts and circumstances in evidence and give it such weight as it is entitled to."

(See, also, People v. Turek, 277 Ill. 621; People v. Schanda, 352 Ill. 36; Goldstein v. Muller, 189 Ill. App. 145; Krasa v. Robbins, 186 Ill. App. 198; Sicss v. Banzula, 183 Ill. App. 192; Chicago Union Traction Company v. O'Donnell, 113 Ill. App. 259.)

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(See, also, People v. Turek, 277 Ill. 621; People v. Johnson, 352 Ill. 36; Goldstein v. Miller, 190 Ill. App. 142; Kraus v. Tolkins, 186 Ill. App. 108; Clause v. Donovan, 183 Ill. App. 192; Chicago Union Traction Company v. O'Connell, 113 Ill. App. 294.)

In our opinion there is ample evidence in the record to sustain the finding of the trial court and the judgment is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

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AFFIRMED.

Sanborn, P. J., and Mitchell, J., concur.

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ANNA BLUESTEIN and
SAMUEL BLUESTEIN,
Appellees,

v.

JACKSON STORAGE & VAN CO.,
a corporation, T. A. JACKSON
and AUSTIN R. CAMPBELL,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

284 I.A. 654

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants, Jackson Storage & Van Company, a corporation (hereinafter referred to as the Jackson Company), T. A. Jackson and Austin R. Campbell, from a judgment for $900 rendered against them by the municipal court in favor of plaintiffs, Anna Bluestein and Samuel Bluestein, in an action tried by the court without a jury.

Samuel Bluestein had been employed by the Jackson Company as a packer in its warehouse at 4050 West Madison street, Chicago, for several years prior to December 19, 1924, at which time Austin R. Campbell, the manager of said warehouse, as well as the treasurer of defendant corporation, suggested to Bluestein the advisability of purchasing stock of the Jackson Company on deferred payments out of his wages. Commencing December 27, 1924, and intermittently thereafter, Bluestein made such purchases of stock at $100 a share until November 11, 1930, when he had bought and paid for twenty-one shares and had received certificates evidencing his ownership of same. All this stock was paid for by him by weekly payments out of his wages except seven shares. Two of the seven shares were delivered to him upon payment of $40 cash, the balance of the pur-

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ANNA SILVERSTEIN and SAMUEL SILVERSTEIN, Appellees,	APPEAL FROM MUNICIPAL
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This is an appeal by defendants, Jackson Storage & Van Company, a corporation (hereinafter referred to as the Jackson Company), T. A. Jackson and Austin R. Campbell, from a judgment for $900 rendered against them by the municipal court in favor of plaintiffs, Anna Silverstein and Samuel Silverstein, in an action tried by the court without a jury.

Samuel Silverstein had been employed by the Jackson Company as a packer in its warehouse at 4030 West Madison street, Chicago, for several years prior to December 1, 1924, at which time Austin R. Campbell, the manager of said warehouse, as well as the treasurer of defendant corporation, suggested to Silverstein the advisability of purchasing stock of the Jackson Company on deferred payments out of his wages. Commencing December 27, 1924, and intermittently thereafter, Silverstein made such purchases of stock at a time a date until November 11, 1930, when he had bought and paid for twenty-one shares and had received certificates evidencing his ownership of same. All this stock was paid for by him by weekly payments out of his wages except seven shares. Two of the seven shares were delivered to him upon payment of $40 each. The balance of the ur-

chase price of same consisting of a stock dividend of $160 declared for the year 1926 on the stock then owned by him. The other five of said seven shares were purchased outright with $500 which Bluestein had received as proceeds of an endowment insurance policy.

On his Jackson Company stock Bluestein received cash dividends of 8% for the years 1924, 1925 and 1926, with an additional stock dividend of 20% in 1926, and 6% cash dividends for the years 1927, 1928, 1929 and 1930, since which year no dividends have been paid. On June 30, 1932, it was found necessary to close the warehouse in which Bluestein was employed and the company dispensed with his services. When he purchased the five shares of stock with his $500 insurance money, it is conceded that it was agreed that upon his request those shares would be repurchased from him. They were so repurchased and he received defendant Jackson's personal check for $500 in payment for same on or shortly prior to the termination of his services on June 30, 1932. Thereafter eight additional shares were repurchased, thereby reducing the amount of stock owned by Bluestein to nine shares, for the purchase price of which this action was brought. April 28, 1933, the certificates evidencing the nine shares of stock still owned by him were transferred by Bluestein to his wife Anna Bluestein, and, upon her request, the nine shares of stock were transferred on the books of the Jackson Company and new certificates covering same issued to Anna Bluestein May 10, 1933. This suit was commenced by Anna Bluestein August 30, 1934, and Bluestein was made an additional party plaintiff November 20, 1934.

Plaintiffs claim that when Bluestein entered into the original contract for the purchase of the stock in December, 1924, Campbell stipulated, as part of such contract, for the repurchase of same. In their amended statement of claim plaintiffs allege inter alia that "at the time the purchases were made said T. A. Jackson, as president,

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Plaintiffs claim that when Blumenstein entered into the original contract for the purchase of the stock in December, 1923, Campbell stipulated, as part of such contract, for the repurchase of same. In their amended statement of claim plaintiffs allege <u>inter alia</u> that "at the time the purchases were made said T. ... Jackson, as president,

and Austin R. Campbell, as treasurer and duly authorized agents of the Jackson Storage and Van Company, a corporation, on behalf of the said corporation, agreed with said plaintiffs to repurchase the above mentioned stock at par from said plaintiffs, at any time requested by the plaintiffs."

It is unquestioned that Bluestein dealt only with Campbell in connection with the purchase of the stock. As to the claimed repurchase agreement he testified that when Campbell discussed with him the advisability of his purchasing the stock, he asked Campbell "what do you do if a man will get laid off, if he loses his job?" He further testified that Campbell answered "you get your money right away. That is all there is to it."

Campbell testified that the matter of the repurchase of the stock bought by Bluestein was never discussed by them and that no agreement for such repurchase was made except as to the five shares heretofore referred to as purchased with the proceeds of an insurance policy. As to them, he stated Bluestein advised him that he had the $500 proceeds of an insurance policy which he intended to give to his daughter who was to be married shortly, and that he would only invest it in the company's stock on condition that he could get the money back when he needed it for his daughter's wedding; and that, after conferring with Jackson, he told Bluestein that those five shares would be repurchased upon request.

Jackson testified that when Campbell informed him of the circumstances he agreed to repurchase the five shares purchased by Bluestein with the insurance money; that all the stock sold to Bluestein and other employees was his personal stock; that the company never sold any stock on deferred payments; that all the stock which was repurchased from Bluestein or other employees was repurchased by him personally; and that he repurchased eight shares

and Austin R. Campbell, as treasurer and duly authorized agents of the Jackson and Van Company, a corporation, on behalf of the said corporation, agreed with said plaintiffs to repurchase the above mentioned stock at par from said plaintiffs, at any time requested by the plaintiffs."

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of stock in addition to the five shares already mentioned, because the Bluesteins were hard up and "I felt that they needed the money."

The court improperly excluded the contents of a letter, the signature to which was admittedly Bluestein's. This letter, addressed to Campbell sometime after Bluestein's discharge, is as follows:

"Dear Mr. Campbell:
I must ask for a favor of you at the present time because of financial difficulties. To pull through this winter, it is necessary for me to cash in two shares of Jackson Storage and Van Company to meet my debts and rentals. Another reason for this action is because of my wife's illness. She is under a doctor's care at present, and she must go to the hospital. If a certificate is desirous, I will gladly get one for you. If I wasn't up against it at present this action would not be taken, on my part. I am sure you will do this great favor me after considering it.
If you wish, I will gladly speak to you concerning this matter personally.

Sincerely yours,
Sam Bluestein."

The trial judge, in announcing his finding, stated:

"The fact that this man was dealing with an employee, apparently one that was not very well educated, there is a certain relationship between employer and employee, that confidence is placed in that employer. While there might not be any direct promise, the circumstances here impress the Court very much that in this matter it was intended to take these stock certificates up when that could be done. It is only a question, I believe, that Mr. Jackson would do that if he had the money. * * *
"I am not holding that there was an actual promise made."

We are mindful of the fact that in a fourth class action in the municipal court, regardless of the allegations of the statement of claim, if the court has jurisdiction of the parties and the subject matter, it may make such finding as the evidence warrants and as is necessary to do justice between the parties. (C. M. & St. P. Ry. v. Faithorn, 167 Ill. App. 420.) We are also mindful of the fact that if the trial court reaches a proper conclusion, its judgment based on such conclusion should not be disturbed, even though the reasons advanced by the court in support of its finding are unsound.

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"Dear Mr. Campbell:
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The trial judge, in announcing his finding, stated:

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In its summation of the evidence the trial court stated that its finding was not based on "an actual promise made" to repurchase Bluestein's stock, but on the confidential "relationship between employer and employee," and that "the circumstances here impress the court very much that in this matter it was intended to take those stock certificates up when that could be done."

In view of this reasoning it is difficult to understand how the court reached the conclusion that defendants were obligated to repurchase the stock by reason of either an express or implied contract. No confidential relationship was shown to have existed, but, if one had, there is not a scintilla of evidence in the record to show that any confidence reposed by Bluestein in the defendants or either of them was abused. Even if it were shown that it was intended by the parties that defendants were to take up Bluestein's stock certificates "when that could be done," the requirements of a binding contract are lacking. Such an indefinite promise is without legal effect. Except for the court's observation that its finding was not based "on an actual promise made," we think that both its reasoning and conclusion resulting in the finding against defendants that they had agreed to repurchase Bluestein's stock were clearly erroneous.

Plaintiffs have taken three variant positions as to the purported agreement to repurchase this stock. In their amended statement of claim they say that defendants agreed to repurchase the stock "any time requested by such plaintiffs." Bluestein testified on the trial that defendants agreed to repurchase the stock at such time as he left the employ of Jackson & Company. In his letter to Campbell written "probably a month or two after the warehouse closed," and long before this action was commenced, Bluestein requested the repurchase of the stock as a "great favor" to him and to

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help him out in his dire need. After a careful consideration of all the evidence we are convinced that the court's finding that defendants agreed to repurchase the stock is against the manifest weight of the evidence.

Even though the court properly found that defendants agreed to repurchase the stock the judgment cannot stand. Plaintiff Samuel Bluestein disposed of all his stock, the subject matter of this suit, by transferring the certificates evidencing same to his wife, the other plaintiff, April 28, 1933, more than a year before this proceeding was instituted. Shortly thereafter Anna Bluestein caused the stock to be transferred to her name and new certificates evidencing same issued to her. Therefore, Bluestein had no legal interest in the subject matter of this suit at the time of its commencement and the court could not enter a valid finding or judgment in his favor. In passing upon this subject in Dix et al. v. Mercantile Ins. Co., 22 Ill. 272, the court said at p. 276:

> "We think a case cannot be found decided in a court of law where a person having no legal interest in the subject matter of the action has been allowed to maintain an action at law alone or with others. It is impossible that he can, since, by his own showing he has nothing for which to sue. All the interest of one of the parties has passed out of him. 16 Peters 501."

It is elementary that Anna Bluestein must show such interest in the subject matter of the suit as will entitle her to recover if the evidence is in other respects sufficient. This action is based upon defendants' alleged contract to repurchase the stock and the evidence fails to show any contractual relation between Anna Bluestein and the defendants, or any or either of them. (Marlitt Deutscher Frauen Verein v. Mueller, 140 Ill. App. 621.) The original contract for the purchase of the stock was between Campbell, acting as agent for T. A. Jackson, and Samuel Bluestein. Anna Bluestein

help him out in his dire need. After a careful consideration of all the evidence we are convinced that the court's finding that defendants agreed to repurchase the stock is against the manifest weight of the evidence.

Even though the court properly found that defendants agreed to repurchase the stock the judgment cannot stand. Plaintiff Samuel Hinestein disposed of all his stock, the subject matter of this suit, by transferring the certificates evidencing same to his wife, the other plaintiff, April 22, 1938, more than a year before this proceeding was instituted. Shortly thereafter Anna Hinestein caused the stock to be transferred to her name and new certificates evidencing same issued to her. Therefore, Hinestein had no legal interest in the subject matter of this suit at the time of its commencement and the court could not enter a valid finding or judgment in his favor. In passing upon this subject in Dix et al. v. Mercantile Ins. Co., 22 Ill. 272, the court said at p. 276:

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It is elementary that Anna Hinestein must show such interest in the subject matter of the suit as will entitle her to recover if the evidence is in other respects sufficient. This action is based upon defendants' alleged contract to repurchase the stock and the evidence fails to show any contractual relation between Anna Hinestein and the defendants, or any or either of them. (Portlik Deutscher Frauen Verein v. Mueller, 140 Ill. App. 621.) The original contract for the purchase of the stock was between Campbell, acting as agent for T. A. Jackson, and Samuel Hinestein. Anna Hinestein

was not present and had no part in its making. It is nowhere claimed or shown that Bluestein acted or purported to act as agent of his wife in purchasing any of the stock. All the stock purchased by him from T. A. Jackson, and later transferred to Anna Bluestein, his wife, was paid for by him out of his separate funds. Therefore, there could not have existed as part of the contract of purchase of the stock by Bluestein either an express or implied undertaking on the part of defendants, or any of them, to repurchase the stock from Anna Bluestein. We are not familiar with any principle of law under which Anna Bluestein had a right of succession to any claim which Samuel Bluestein might have had under his alleged contract of repurchase. It thus appears that neither Samuel Bluestein nor Anna Bluestein had such a legal interest in this cause as would support a finding in favor of both or either of them.

The uncontradicted evidence of defendants conclusively shows that all the stock sold to Bluestein was that owned personally by T. A. Jackson, except the two shares paid for largely by the stock dividend, and that T. A. Jackson personally repurchased the thirteen shares of stock from plaintiffs. This being so, no contractual relations were shown to have existed between the Jackson Company and Bluestein in connection with the purchase of the stock, and the judgment against the corporation was therefore improvident and erroneously entered. The same is true also as to defendant Campbell, who was shown by the evidence to have simply been the agent of T. A. Jackson in the sale of the stock to Bluestein, and not the owner of any of it.

Many other points are urged for the reversal of the judgment and, while we have considered all of them, further discussion would not only unduly lengthen this opinion but is unnecessary in the view we take of this cause.

For the reasons indicated herein, the judgment of the municipal court is reversed.

REVERSED.

Scanlan, P. J., and Friend, J., concur.

was not present and had no part in its making. It is nowhere claimed or shown that Einstein acted or purported to act as agent of his wife in purchasing any of the stock. All the stock purchased by him from T. A. Jackson, and later transferred to Anna Einstein, his wife, was paid for by him out of his separate funds. Therefore, there could not have existed as part of the contract of purchase of the stock by Einstein either an express or implied understanding on the part of defendants, or any of them, to repurchase the stock from Anna Einstein. We are not familiar with any principle of law under which Anna Einstein had a right of succession to any claim which Samuel Einstein might have had under his alleged contract of repurchase. It thus appears that neither Samuel Einstein nor Anna Einstein had such a legal interest in this suit as would support a finding in favor of both or either of them.

The uncontradicted evidence of defendants conclusively shows that all the stock sold to Einstein was that owned personally by T. A. Jackson, except the two shares paid for largely by the stock dividend, and that T. A. Jackson personally repurchased the thirteen shares of stock from plaintiffs. This being so, no contractual relations were shown to have existed between the Jackson Company and Einstein in connection with the purchase of the stock, and the judgment against the corporation was therefore improvident and erroneously entered. The case is true also as to defendant Campbell, who was shown by the evidence to have simply been the agent of T. A. Jackson in the sale of the stock to Einstein, and not the owner of any of it.

Many other points are urged for the reversal of the judgment and, while we have considered all of them, further discussion would not only unduly lengthen this opinion but is unnecessary in the view we take of this cause.

For the reasons indicated herein, the judgment of the municipal court is reversed.

REVERSED.

Sommer, P. J., and Tried, J., concur.

38321

WHITE EAGLE BUILDING & LOAN ASSOCIATION, a corporation, Appellee,

v.

ESTELLA KWIATKOWSKI et al., Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

284 I.A. 655

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is the third time this case has been before this court for review. The opinion filed February 23, 1932, on the first appeal from a decree dismissing this cause for want of equity stated: "After a careful study of the master's certificate of evidence, we have reached the conclusion that the evidence in its present shape is not sufficient to enable us to determine the rights of the parties." (White Eagle Bldg. & Loan Ass'n v. Kwiatkowski et al., 265 Ill. App. 601.) In our opinion filed November 27, 1934, in White Eagle Bldg. & Loan Ass'n v. Kwiatkowski et al., 277 Ill. App. 626, we said: "The association's right to foreclose the $8,000 mortgage has not been established by satisfactory evidence and we are convinced that justice demands a retrial of this case."

The instant appeal seeks to reverse a decree of foreclosure and sale entered by the circuit court against Estella Kwiatkowski, individually and as administratrix of the estate of her mother, Katarzyna Kwiatkowski, and other defendants, who were the nine children of the mortgagors, Jan and Katarzyna Kwiatkowski, the four youngest of whom were at the time the decree was entered minors for whom a guardian ad litem was appointed. Three amended

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The instant appeal seeks to reverse a decree of foreclosure and sale entered by the circuit court against Estella Kwiatkowski, individually and as administratrix of the estate of her mother, Katarzyna Kwiatkowski, and other defendants, who were the nine children of the mortgagors, Jan and Katarzyna Kwiatkowski, the four youngest of whom were at the time the decree was entered minors for whom a guardian ad litem was appointed. Three amended

bills and one supplemental bill have been filed by plaintiff, White Eagle Building & Loan Association (hereinafter referred to as the association). Its third amended bill filed February 1, 1935, after the case was last remanded, alleges substantially that it was a building and loan association, duly incorporated under the laws of the State of Illinois; that September 18, 1924, Jan and Katarzyna Kwiatkowski were the owners in fee simple of certain real estate which was subject to the lien of a trust deed executed to secure the payment of an indebtedness of $5,000 and interest thereon to the Peoples Stock Yards State Bank as trustee; that September 18, 1924, Jan Kwiatkowski and Katarzyna Kwiatkowski, his wife, applied for membership in the association, became members thereof and subscribed for and became the owners of eighty shares of stock issued by it at $100 a share; that on the same date they applied for a loan, subject to the provisions of the charter and by-laws of the association, for the purpose of discharging the lien of the trust deed then outstanding against said real estate; that their application for the loan was accepted and they executed a written agreement, which acknowledged their indebtedness of $8,000 to the association; that to secure this indebtedness the Kwiatkowskis assigned their stock in the association to plaintiff and executed and delivered a mortgage conveying the real estate in question to the association, which mortgage was duly recorded; that plaintiff is the legal holder and owner of the notes evidencing this indebtedness and the mortgage securing same; that pursuant to the execution and delivery of the mortgage to it, the association's check for $8,000 was drawn and delivered to Jan Kwiatkowski, which check was thereafter paid in due course; that the mortgagors have defaulted in the payment of the weekly and monthly installments due under their mortgage agreement, as well as in the payment of taxes,

bills and one supplemental bill have been filed by plaintiff, White Eagle Building & Loan Association (hereinafter referred to as the association). The third amended bill filed February 1, 1938, after the case was last remanded, alleges substantially that it was a building and loan association, duly incorporated under the laws of the State of Illinois; that September 18, 1924, Ian and Katarzyna Kwiatkowski were the owners in fee simple of certain real estate which was subject to the lien of a trust deed executed to secure the payment of an indebtedness of $8,000 and interest thereon to the People State Bank of Warsaw as trustee; that September 18, 1924, Ian Kwiatkowski and Katarzyna Kwiatkowski, his wife, applied for membership in the association, became members thereof and subscribed for and became the owners of eighty shares of stock issued by it at $100 a share; that on the same date they applied for a loan, subject to the provisions of the charter and by-laws of the association, for the purpose of discharging the lien of the trust deed then outstanding against said real estate; that their application for the loan was accepted and they executed a written agreement, which acknowledged their indebtedness of $8,000 to the association; that to secure this indebtedness the Kwiatkowskis assigned their stock in the association to plaintiff and executed and delivered a mortgage conveying the real estate in question to the association, which mortgage was duly recorded; that plaintiff is the legal holder and owner of the notes evidencing this indebtedness and the mortgage securing same; that pursuant to the execution and delivery of the mortgage to it, the association's check for $8,000 was drawn and delivered to Ian Kwiatkowski, which check was thereafter paid in due course; that the mortgors have defaulted in the payment of the weekly and monthly installments due under their mortgage agreement, as well as in the payment of taxes,

special assessments and insurance, which the association was compelled to pay; that the Kwiatkowskis failed and neglected to pay out of the proceeds of the $8,000 check the indebtedness secured by the prior trust deed outstanding against said real estate and to discharge the lien thereof; that in order to protect the lien of its $8,000 mortgage, plaintiff was compelled to and did on February 28, 1927, pay to the Peoples Stock Yards State Bank $5,331.76, which comprised the balance of the principal and interest due on the indebtedness secured by the prior trust deed and charges in connection therewith; that, because of the default of the mortgagors in respect to the terms and conditions of their $8,000 mortgage and by reason of their failure to pay the notes secured by the prior trust deed and thereby secure the discharge of the same as a first lien upon the premises, a resolution was adopted by the association January 21, 1929, directing that foreclosure proceedings be instituted. This resolution, which was attached to the complaint as an exhibit, after reciting that the mortgagors were in default to the association in the payment of weekly and monthly installments as provided in the mortgage agreement, that on October 2, 1926, it learned that the trust deed was still outstanding against the premises as a first lien, and that for the purpose of protecting its interest in said property plaintiff purchased said trust deed and the notes which it secured from the Peoples Stock Yards State Bank for $5,331.76, directed the foreclosure by the association of the $8,000 mortgage and the trust deed. The third amended complaint prayed, among other things, for an accounting and for the foreclosure of the $8,000 mortgage, as well as the trust deed.

Prior to the filing of the original complaint in this cause the makers of the mortgage, Jan and Katarzyna Kwiatkowski, had died. The premises in question are improved with a two-flat building, one of which flats was occupied by the aforesaid Jan and

special assessments and insurance, which the association was compelled to pay; that the Kwiatkowskis failed and neglected to pay out of the proceeds of the $8,000 check the indebtedness secured by the prior trust deed outstanding against said real estate and to discharge the lien thereof; that in order to protect the lien of its $8,000 mortgage, plaintiff was compelled to and did on February 28, 1927, pay to the Peoples Stock Yards State Bank $6,331.76, which comprised the balance of the principal and interest due on the indebtedness secured by the prior trust deed and charges in connection therewith; that, because of the default of the mortgagors in respect to the terms and conditions of their $8,000 mortgage and by reason of their failure to pay the notes secured by the prior trust deed and thereby secure the discharge of the same as a first lien upon the premises, a resolution was adopted by the association January 21, 1929, directing that foreclosure proceedings be instituted. This resolution, which was attached to the complaint as an exhibit, after reciting that the mortgagors were in default to the association in the payment of weekly and monthly installments as provided in the mortgage agreement, that on October 2, 1928, it learned that the trust deed was still outstanding against the premises as a first lien, and that for the purpose of protecting its interest in said property plaintiff purchased said trust deed and the notes which it secured from the Peoples Stock Yards State Bank for $6,331.76, directed the foreclosure by the association of the $8,000 mortgage and the trust deed. The third amended complaint prayed, among other things, for an accounting and for the foreclosure of the $8,000 mortgage, as well as the trust deed.

Prior to the filing of the original complaint in this cause the makers of the mortgage, Jan and Katarzyna Kwiatkowski, had died. The premises in question are improved with a two-flat building, one of which flats was occupied by the aforesaid Jan and

Katarzyna Kwiatkowski and their family during their lifetime and after their death by their children. Estella Kwiatkowski, individually and as administratrix of the estate of her mother, Katarzyna Kwiatkowski, filed an answer to the third amended complaint, the pertinent portions of which are as follows:

"(1) This defendant says that she has no knowledge of the execution and delivery of the mortgage and contract for the payment of Eight Thousand Dollars ($8,000.00) mentioned in the complainant's third amended bill of complaint and calls for strict proof thereof.

(2) This defendant further answering denies that the complainant ever paid the sum of Eight Thousand Dollars ($8,000.00) or any part thereof, to Jan Kwiatkowski or to Katarzyna Kwiatkowski, his wife. Said defendant further answering alleges upon information and belief and charges the fact to be that at the time of the execution of said mortgage for the sum of Eight Thousand Dollars ($8,000.00), described in the complainant's third amended bill of complaint, there was a prior mortgage upon said premises amounting to approximately the sum of Five Thousand Dollars ($5,000.00); that the proceeds of said mortgage for the sum of Eight Thousand Dollars ($8,000.00) were to be used, among other things, for the purpose of taking up said mortgage and the balance of the same to be paid to Jan Kwiatkowski and Katarzyna Kwiatkowski; that the proceeds of said loan of Eight Thousand Dollars ($8,000.00) were not used for said purpose; that no part of the same was paid to said Jan Kwiatkowski or Katarzyna Kwiatkowski, his wife, and no part of the same was used for the purpose of taking up said first mortgage then upon said real estate, but that all of said proceeds were wrongfully misappropriated by agents and servants on behalf of the complainant.

(3) This defendant further answering alleges that no proper resolution was passed on behalf of the complainant herein authorizing or directing a foreclosure of the mortgage in question by reason of any existing breach thereof.

(4) This defendant further answering alleges that the purchase by the complainant of the notes and Trust Deed, as alleged by the complainant, during the year 1927, from the Peoples Stock Yards State Bank, was ultra vires and unlawful; that the same constituted an illegal transaction on the part of the complainant, and that the complainant is entitled to no relief in a Court of equity by reason of the purchase of said notes and Trust Deed."

An answer was filed on behalf of the minor defendants by their guardian ad litem, alleging that "these defendants state that the transaction alleged in the complainant's third amended bill of complaint is ultra vires and unlawful; that the same cannot be enforced in a court of equity against these defendants, or any one of these defendants."

When this cause was before us on the last previous occasion, we were called upon to review a decree wherein the chancellor found

Katarzyna Kwiatkowski and their family during their lifetime and after their death by their children. Estella Kwiatkowski, individually and as administratrix of the estate of her mother, Katarzyna Kwiatkowski, filed an answer to the third amended complaint, the pertinent portions of which are as follows:

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An answer was filed on behalf of the minor defendants by their guardian ad litem, alleging that "these defendants state that the transaction alleged in the complainant's third amended bill of complaint is ultra vires and unlawful; that the same cannot be enforced in a court of equity against these defendants, or any one of these defendants."

When this cause was before us on the last previous occasion, we were called upon to review a decree wherein the chancellor found

that the amount due and owing to plaintiff association was as follows:

"Amount of principal due under Mortgage	$ 8,000.00
Interest thereon at 6% per annum, from September 18, 1924, to March 2, 1933, date of Master's Report	4,060.00
Amount due for membership fees and fines	24.70
Total	$12,084.70
Less credit due for moneys paid to apply on said Mortgage	1,901.20
Balance due under said mortgage	$10,183.50
Complainant's solicitors' fees	500.00
Total amount due to Complainant, including solicitors' fees	$10,683.50."

It will be noted that in that decree the chancellor found nothing due and owing to plaintiff by reason of its purchase for $5,331.76 of the outstanding notes and trust deed from the Stock Yards State Bank.

Although the decree from which the instant appeal is taken finds that plaintiff is the owner and holder of the $8,000 mortgage executed by Jan and Katarzyna Kwiatkowski September 18, 1924, and that same is a valid and subsisting lien, it does not find anything due thereunder.

Since the case was last remanded there has been no rereference of the cause and the hearing resulting in the present decree was had upon the same master's report, including the proofs and exhibits, before us when the case was last considered by this court.

Notwithstanding that the master in his report found that under the "agreement in writing and mortgage, of which it is the legal holder and owner" there was due and owing to the association $17,832.06, which comprised the amount found due and owing on the $8,000 mortgage executed by the Kwiatkowskis and delivered to the association and on the notes and trust deed constituting the prior lien, which were purchased for $5,331.76 by plaintiff from the

that the amount due and owing to plaintiff association was as follows:

"Amount of principal due under Mortgage	$ 8,000.00
Interest thereon at 6% per annum, from September 18, 1924, to March 2, 1933, date of Master's Report	4,060.00
Amount due for membership fees and fines	24.70
Total	$12,084.70
Less credit due for money paid to apply on said Mortgage	1,901.20
Balance due under said mortgage	$10,183.50
Complainant's solicitors' fees	500.00
Total amount due to complainant, including solicitors' fees	$10,683.50."

It will be noted that in that decree the commission found nothing due and owing to plaintiff by reason of its purchase for $5,321.76 of the outstanding notes and trust deed from the Stock Yards State Bank.

Although the decree from which the instant appeal is taken finds that plaintiff is the owner and holder of the $8,000 mortgage executed by Jon and Katarzyna Wisikowski September 18, 1924, and that same is a valid and subsisting lien, it does not find anything due thereunder.

Since the case was last remanded there has been no reference of the cause and the hearing resulting in the present decree was had upon the same master's report, including the proofs and exhibits, before us when the case was last considered by this court.

Notwithstanding that the master in his report found that under the "agreement in writing and mortgage, of which it is the legal holder and owner" there was due and owing to the association $17,832.06, which comprised the amount found due and owing on the $8,000 mortgage executed by the Wisikowskis and delivered to the association and on the notes and trust deed constituting the prior lien, which were purchased for $5,321.76 by plaintiff from the

Peoples Stock Yards State Bank, the decree now before us for consideration, after overruling all exceptions to the master's report, ordered that it be approved in all respects, and then found, in effect, that there was nothing due plaintiff under the $8,000 mortgage. It is reasonable to infer that upon the last hearing of this cause before the chancellor, the association abandoned its claim under the $8,000 mortgage because the evidence was not only not convincing that the Kwiatkowskis received the $8,000 for which that mortgage was given, but strongly tended to show that they did not receive that money or any part of it, but that it was misappropriated by an agent of plaintiff.

The decree proceeded to find that on September 18, 1924, Jan Kwiatkowski and his wife became indebted to plaintiff in the sum of $8,000 for money loaned to them by the association and that to secure the payment of same and interest thereon they executed the mortgage on the premises involved herein; that plaintiff was and is the legal owner and holder of said mortgage and entitled to all the benefits thereof; that at the time the said loan was negotiated there appeared of record against the premises a trust deed executed February 24, 1924, by former owners of the property to the Peoples Stock Yards State Bank to secure an indebtedness of $5,000; that on February 28, 1927, plaintiff paid the Peoples Stock Yards State Bank $5,331.76, the moneys due and owing to it in connection with its notes and trust deed and a deed was executed and delivered by said bank to plaintiff, releasing the lien of its trust deed, which release deed was duly recorded, thereby making the mortgage of the association a first lien on the premises; that the mortgage herein sought to be foreclosed is a valid subsisting first lien upon the premises involved; that upon the payment by plaintiff of the $5,331.76, the principal and interest notes and trust deed evidencing the indebtedness and prior lien were marked paid and

Peoples Stock Yards State Bank, the decree now before us for consideration, after overruling all exceptions to the master's report, ordered that it be approved in all respects, and then found, in effect, that there was nothing due plaintiff under the $8,000 mortgage. It is reasonable to infer that upon the last hearing of this cause before the chancellor, the association abandoned its claim under the $8,000 mortgage because the evidence was not only not convincing that the Kwiatkowskis received the $8,000 for which that mortgage was given, but strongly tended to show that they did not receive that money or any part of it, but that it was misappropriated by an agent of plaintiff.

The decree proceeded to find that on September 18, 1924, Jan Kwiatkowski and his wife became indebted to plaintiff in the sum of $8,000 for money loaned to them by the association and that to secure the payment of same and interest thereon they executed the mortgage on the premises involved herein; that plaintiff was and is the legal owner and holder of said mortgage and entitled to all the benefits thereof; that at the time the said loan was negotiated there appeared of record against the premises a trust deed executed February 24, 1924, by former owners of the property to the Peoples Stock Yards State Bank to secure an indebtedness of $3,000; that on February 28, 1927, plaintiff paid the Peoples Stock Yards State Bank $3,331.76, the moneys due and owing to it in connection with its notes and trust deed and a deed was executed and delivered by said bank to plaintiff, releasing the lien of its trust deed, which release deed was duly recorded, thereby making the mortgage of the association a first lien on the premises; that the mortgage herein sought to be foreclosed is a valid subsisting first lien upon the premises involved; that upon the payment by plaintiff of the $3,331.76, the principal and interest notes and trust deed evidencing the indebtedness and prior lien were marked paid and

cancelled; that no part of that amount has been repaid to plaintiff by any one; and that "the amount of the account due plaintiff herein" is as follows:

"Amount paid by plaintiff for Trust Deed notes, interest and expenses held by Peoples Stock Yards State Bank, a corporation, as Trustee, recorded as document Number 301094 securing said indebtedness of Five Thousand Dollars ($5000) and interest - - - - - -	$5,331.76
Interest thereon at Seven per cent (7%) per annum from July 24, 1930 to December 24, 1934 - - - -	1,648.39
Solicitor's fees - - - - - - - - - - - - - - - - - - -	500.00
Stenographer's fees - - - - - - - - - - - - - - - - -	74.40
TOTAL - - - - - - - - -	$7,554.55."

The decree further found that plaintiff has a valid and subsisting first lien on the premises for the foregoing total amount so found to be due and owing to it, together with interest, costs and master's fees; and that plaintiff is entitled to the foreclosure of said mortgage and to have the premises sold to satisfy the lien. The decree ordered the sale of the property in the event that the defendants or any of them did not pay plaintiff within two days the amount so found due and owing.

Defendants' major contentions are that the $8,000 mortgage executed and delivered to plaintiff association by the Kwiatkowskis is invalid and of no legal effect because they did not receive all or any part of the $8,000, the payment of which the mortgage was given to secure, but that plaintiff's agent or agents misappropriated the $8,000 for which plaintiff's check was drawn and paid; and that the association having no interest in the premises involved through such mortgage or otherwise, its purchase of the notes and trust deed from the Peoples Stock Yards State Bank was <u>ultra vires</u> and unlawful.

As stated heretofore, the trial court entered the decree now before us on the identical evidence contained in the master's report before the chancellor on the last previous hearing below. After a careful examination and analysis of that evidence, we held in our former opinion that it was unsatisfactory and insufficient to show that Jan Kwiatkowski or his wife received the $8,000 for which they

cancelled; that no part of that amount has been repaid to plaintiff by any one; and that "the amount of the account due plaintiff herein" is as follows:

"Amount paid by plaintiff for Trust Deed notes, interest and expenses held by Peoples Stock Yards State Bank, a corporation, as Trustee, recorded as document Number 301294 securing said indebtedness of Five Thousand Dollars ($5000) and interest - - - - - - - $5,331.76
Interest thereon at Seven per cent (7%) per annum from July 24, 1930 to December 24, 1934 - - - - 1,646.39
Solicitor's fees - 500.00
Stenographer's fees - - - - - - - - - - - - - - - - - - 74.40
TOTAL - $7,554.55."

The decree further found that plaintiff has a valid and subsisting first lien on the premises for the foregoing total amount so found to be due and owing to it, together with interest, costs and master's fees; and that plaintiff is entitled to the foreclosure of said mortgage and to have the premises sold to satisfy the lien. The decree ordered the sale of the property in the event that the defendants or any of them did not pay plaintiff within two days the amount so found due and owing.

Defendants' major contentions are that the $8,000 mortgage executed and delivered to plaintiff association by the Kwiatkowskis is invalid and of no legal effect because they did not receive all or any part of the $8,000, the payment of which the mortgage was given to secure, but that plaintiff's agent or agents misappropriated the $8,000 for which plaintiff's check was drawn and paid; and that the association having no interest in the premises involved through such mortgage or otherwise, its purchase of the notes and trust deed from the Peoples Stock Yards State Bank was ultra vires and unlawful.

As stated heretofore, the trial court entered the decree now before us on the identical evidence contained in the master's report before the chancellor on the last previous hearing below. After a careful examination and analysis of that evidence, we held in our former opinion that it was unsatisfactory and insufficient to show that Jan Kwiatkowski or his wife received the $8,000 for which they

executed and delivered their mortgage. Instead of merely referring to our opinion in White Eagle Building & Loan Ass'n v. Kwiatkowski et al., 277 Ill. App. 626, for the facts and our conclusions thereon, for the sake of clarity we quote at length therefrom:

"The transcript of the evidence introduced before the master, which is included in the record, discloses that one Bruno F. Kowalewski, who was the official notary public for the association, brought Jan Kwiatkowski and his wife to a meeting of the board of directors of the association so they might make an application for a loan; that the association was advised at that time that there was an existing incumbrance (trust deed) of $5,000 against the property; that their application for membership in the association was accepted and the board of directors authorized a loan of $8,000 to them; that September 18, 1924, Jan Kwiatkowski and his wife executed an agreement which set forth the terms of the payment of the loan and other terms and conditions upon which the loan was made; that on the same date they executed a mortgage for $8,000 on the premises in question, as security for the loan, in the office of Kowalewski, which was acknowledged and witnessed by the employees of Kowalewski, or the Sherman Park State Bank, which occupied the same office as he did, and of which he was the president; that neither Jan Kwiatkowski nor his wife could write, and that they affixed their signatures to both the agreement and the mortgage by placing their 'mark' thereon; that November 24, 1924, one Frank A. Kolesiak, secretary of the association, drew a check for $8,000 to the order of Jan Kwiatkowski; that the secretary testified that he brought Kowalewski with him on the night of November 24, 1924, after a meeting of the association, to deliver the check to Kwiatkowski at his home, without any explanation as to why he brought Kowalewski; that the secretary testified further tha at the Kwiatkowski home 'I handed them that - laid that check before them * * * Jan Kwiatkowski made that cross (indorsement on the check) and then I fill in his "mark" above and below and put his name on the other side of it as Jan Kwiatkowski; also filled in the other lines as witness to his mark * * * it was left with Mr. Kwiatkowski * * * I went home after that * * *. It came through Sherman Park State Bank six days later.'

"The transcript further disclosed that Kolesiak testified that he could not identify the signature 'B. F. Kowalewski,' which was indorsed on the back of the check (on the previous hearing of this cause he positively identified Kowalewski's indorsement); that he did not carry the check away with him and he did not know whether Kowalewski did or not; and that Kowalewski left the Kwiatkowski home with him.

"The transcript also disclosed that Kowalewski committed suicide May 14, 1925, and that Kolesiak testified further that the association learned for the first time on October 2, 1926, that the $5,000 indebtedness secured by the trust deed had never been paid and that the trust deed was still outstanding as a first lien against the property.

"Defendants offered in evidence a certified copy of a claim for $20,218.50, made by the association March 1, 1926, and allowed March 22, 1926, in the Probate court, against the estate of Bruno F. Kowalewski, which included an item 'To cash advanced a/c J. Kwiatkowski ... $4500.00' Objection was made and sustained to this offer and this claim was excluded from the evidence. The transcript further disclosed that a resolution was adopted by

executed and delivered their mortgage. Instead of merely referring to our opinion in White Eagle Building & Loan Ass'n v. Kwiatkowski et al., 277 Ill. App. 626, for the facts and our conclusions thereon, for the sake of clarity we quote at length therefrom:

"The transcript of the evidence introduced before the master, which is included in the record, discloses that one Bruno T. Kowslewski, who was the official notary public for the association, brought Jan Kwiatkowski and his wife to a meeting of the board of directors of the association so they might make an application for a loan; that the association was advised at that time that there was an existing incumbrance (trust deed) of $5,000 against the property; that their application for membership in the association was accepted and the board of directors authorized a loan of $8,000 to them; that September 18, 1924, Jan Kwiatkowski and his wife executed an agreement which set forth the terms of the payment of the loan and other terms and conditions upon which the loan was made; that on the same date they executed a mortgage for $8,000 on the premises in question, as security for the loan, in the office of Kowslewski, which was acknowledged and witnessed by the employees of Kowslewski, or the Chicago Park State Bank, which occupied the same office as he did, and of which he was the president; that neither Jan Kwiatkowski nor his wife could write, and that they affixed their signatures to both the agreement and the mortgage by placing their 'marks' thereon; that November 24, 1924, one Frank A. Kolesnik, secretary of the association, drew a check for $8,000 to the order of Jan Kwiatkowski; that the secretary testified that he brought Kowslewski with him on the night of November 24, 1924, after a meeting of the association, to deliver the check to Kwiatkowski at his home, without any explanation as to why he brought Kowslewski; that the secretary testified further that at the Kwiatkowski home 'I handed them that - laid that check before them * * * Jan Kwiatkowski made that cross (indorsement on the check) and then I fill in his "mark" above and below and put his name on the other side of it as Jan Kwiatkowski; also filled in the other lines as witness to his mark * * * it was left with Mr. Kwiatkowski * * * I went home after that * * *. It came through Sherman Park State Bank six days later.'

"The transcript further discloses that Kolesnik testified that he could not identify the signature 'B. T. Kowslewski,' which was indorsed on the back of the check (on the previous hearing of this cause he positively identified Kowslewski's indorsement); that he did not carry the check away with him and he did not know whether Kowslewski did or not; and that Kowslewski left the Kwiatkowski home with him.

"The transcript also disclosed that Kowslewski committed suicide May 14, 1925, and that Kolesnik testified further that the association learned for the first time on October 7, 1925, that the $5,000 indebtedness secured by the trust deed had never been paid and that the trust deed was still outstanding as a first lien against the property.

"Defendants offered in evidence a certified copy of a claim for $20,218.50, made by the association March 1, 1926, and allowed March 22, 1926, in the probate court, against the estate of Bruno T. Kowslewski, which included an item 'To cash advanced a/c J. Kwiatkowski ... $4,500.00' Objection was made and sustained to this offer and this claim was excluded from the evidence. The transcript further discloses that a resolution was adopted by

the board of directors of the association February 13, 1927, to pay the $4,500 balance of the indebtedness secured by the outstanding trust deed and same was paid with interest and charges, aggregating $5,331.76, and the trust deed was released; and that Kolesiak testified that the records of the association showed $1,901.20 to have been paid on the $8,000 mortgage account of the Kwiatkowskis, the last payment of $275 having been made February 22, 1926. * * *

"It is urged that Kowalewski acted as the agent of the Kwiatkowskis in the loan transaction. There is not a scintilla of evidence in the record to sustain such contention. Complainant's own evidence is overwhelmingly to the contrary. Kowalewski was the official notary public for the association. From his title it is fair and reasonable to assume that it was his duty to prepare and see to the execution and acknowledgment of the instruments necessary to consummate loans made by the association. His employees prepared the Kwiatkowski mortgage and witnessed and acknowledged its execution. The secretary of the association testified that Kowalewski 'made loans to people in his own bank and also brought applicants to the association for loans,' and 'yes, others, because he has been connection with three or four building and loan associations.' Kowalewski was in the business of making loans and it is idle to assert that, merely because he brought these applicants for a loan to the association, he was their agent. We think from the evidence it is reasonable to infer that, when the Kwiatkowskis applied to Kowalewski for a loan, it was not feasible at the time to make the loan himself and that he brought them to the association, which he not only represented but in which he held a recognized office and title. * * *

"It is not only improbable but preposterous and beyond the realm of understanding and belief that, according to its theory of fact, the officers of this association with their experience in the real estate mortgage business, would, having been advised that there was an outstanding trust deed against the title to this property, and, we assume, having knowledge that under the law the association was restricted to making loans on unincumbered property, deliberately turn over to a man unable to write and inexperienced in business affairs its check for $8,000, and leave it to him to do the things necessary to clear the title to the property in question. Reason and logic show the absurdity of such a theory.

"We think it is reasonable to assume that the parties to the transaction did not contemplate that the task of closing the deal would be left to Kwiatkowski, nor that the full amount of the loan would be placed in his hands.

"There was no concealment by him or misrepresentation as to the trust deed then outstanding as a lien against the property. In our opinion all that he bargained for and all that he expected to receive was the balance of the $8,000 remaining after the indebtedness secured by the trust deed had been paid and discharged. We can imagine his surprise and consternation when the secretary of the association and Kowalewski made their nocturnal visit and insisted on turning over to him the entire $8,000.

"If the secretary of the association actually intended to deliver the check to the Kwiatkowskis so that they might deposit it or cash it and secure its proceeds, it is inconceivable that he should insist upon its indorsement that night. That would have been indeed a highly precarious method of doing business which could serve no useful or prudent purpose.

"Kowalewski's office of notary public in the association surely must have imposed some duties upon him. From all of the evidence in this cause and the reasonable inferences that may be drawn therefrom, we are impelled to the conclusion that Kowalewski

the board of directors of the association February 14, 1927, to pay the $4,500 balance of the indebtedness assumed by the outstanding trust deed and same was paid with interest and charges, aggregating $2,881.76, and the trust deed was released; and that Kolesnik testified that the records of the association showed $1,901.20 to have been paid on the $8,000 mortgage account of the Kwiatkowskis, the last payment of $275 having been made February 20, 1928. * * *

"It is urged that Kowalewski acted as the agent of the Kwiatkowskis in the loan transaction. There is not a scintilla of evidence in the record to sustain such contention. Complainant's own evidence is overwhelmingly to the contrary. Kowalewski was the official notary public for the association. From his title it is fair and reasonable to assume that it was his duty to prepare and see to the execution and acknowledgment of the instruments necessary to consummate loans made by the association. His employee prepared the Kwiatkowski mortgage and witnessed and acknowledged its execution. The secretary of the association testified that Kowalewski 'made loans to people in his own bank and also brought applicants to the association for loans,' and 'yes, others, because he was been connection with three or four building and loan associations.' Kowalewski was in the business of making loans and it is idle to assert that, merely because he brought these applicants for a loan to the association, he was their agent. We think from the evidence it is reasonable to infer that, when the Kwiatkowskis applied to Kowalewski for a loan, it was not feasible at the time to make the loan himself and that he brought them to the association, which he not only represented but in which he held a responsible office and title. * * *

"It is not only improbable but improbatione and beyond the realm of substantial and belief that, according to the theory of fact, the officers of this association with their experience in the real estate mortgage business, would, having been advised that there was an outstanding trust deed against the title to this property, and, we assume, having knowledge that under the law the association was restricted to making loans on unencumbered property, deliberately turn over to a man unable to read and incompetent in business affairs the check for $8,000, and leave it to him to do the things necessary to clear the title to the property in question. Reason and logic urge the absurdity of such a theory.

"We think it is reasonable to assume that the portion to the transaction did not contemplate that the task of closing the deal would be left to Kwiatkowski, nor that the full amount of the loan would be placed in his hands.

"There was no concealment by him or misrepresentation as to the trust deed when contracting as a lien against the property. In our opinion all that he bargained for and all that he expected to receive was the balance of the $8,000 remaining after the indebtedness assumed by the trust deed had been paid and it discharged. We can imagine his surprise and consternation when the secretary of the association and Kowalewski made their nonsensical claim and insisted on turning over to him the entire $8,000.

"If the secretary of the association acted in good faith in intended to deliver the check to the Kwiatkowskis so that they might deposit it or cash it and secure the proceeds, it is inconceivable that he should insist upon the transaction that night. That would have been indeed a highly precarious method of doing business which could serve no useful or prudent purpose.

"Kowalewski's office of notary public in the association surely must have imposed some duties upon him. From all of the evidence in this case, and the reasonable inferences that may be drawn therefrom, we are inclined to the conclusion that Kowalewski

as notary public of the association was charged with the duty of consummating its mortgage transactions. That explains the necessity of the secretary of the association taking Kowalewski with him to the Kwiatkowski home and securing Kwiatkowski's immediate indorsement of the check, so that Kowalewski might take the check with him, pay off the then existing incumbrance and return the balance to Kwiatkowski. The evidence is conclusive that he did not pay the indebtedness secured by the trust deed and there is no direct evidence in the record that he returned any part of the proceeds of the check to Kwiatkowski.

"The association insists that because its records show payments on account of the Kwiatkowski mortgage indebtedness, the Kwiatkowskis must have received the money. There is no evidence in the record as to who made such payments, if they were made, and, in view of all the facts and circumstances as they are presented by the record in this cause, we are constrained to hold that there is nothing conclusive in the records of the association of such payments that the Kwiatkowskis received all or any part of the $8,000. Kolesiak alone testified as to the association's record of payments on the Kwiatkowski mortgage account, and, by reason of the nature and character of his testimony as to the delivery of the $8,000 check to Kwiatkowski, all of his testimony must be viewed with suspicion or entirely disregarded.

"We are of the opinion that the master erroneously excluded from the evidence the association's claim against the Kowalewski estate in the Probate court and its allowance. It tended to show that at the time the claim was made the association charged Kowalewski with misappropriating at least $4,500 advanced to him on Kwiatkowski's account. We think it was clearly admissible."

Plaintiff's case is based entirely upon the testimony of its secretary, Kolesiak. As a further indication of the unreliability of his testimony we now note from the master's transcript of the evidence that Kolesiak testified that the association first learned on October 2, 1926, that the trust deed of the Peoples Stock Yards State Bank was still outstanding as a first lien against the property, notwithstanding that he signed and filed the claim against the Kowalewski estate in the Probate court on March 6, 1926. Although he signed and filed this claim he disclaimed knowledge of its contents, which were as follows:

"White Eagle Building and Loan Association
in account with Bruno F. Kowalewski.

To cash advanced,	a/c K. Kelpszas	- - - - - - - - - - - - -	$3744.00
" " "	a/c W. Ostrowski	- - - - - - - - - - - - -	2064.50
" " "	a/c T. Filipiak	- - - - - - - - - - - - -	1900.00
" " "	a/c J. Kwiatkowski	- - - - - - - - - - - - -	4500.00
" " "	a/c A. Martynowicz	- - - - - - - - - - - - -	2000.00
" " "	a/c W. Gregerowicz	- - - - - - - - - - - - -	6000.00
		Total - - - -	$20,218.50."

It will be seen from the foregoing that plaintiff's c7

as notary public of the association was charged with the duty of consummating the mortgage transactions. And explaining the necessity of the secretary of the association taking Kowalewski with him to the Wisniewski home and securing Wisniewski's immediate indorsement of the check, so that Kowalewski might take the check with him, pay out the then existing indebtedness and return the balance to Wisniewski. The evidence is conclusive that he did not pay the indebtedness secured by the trust deed and there is no direct evidence in the record that he returned any part of the proceeds of the check to Wisniewski.

"The association insists that because its records show payments on account of the Wisniewski mortgage indebtedness, the Wisniewskis must have received the money. There is no evidence in the record as to who made such payments, if they were made, and, in view of all the facts and circumstances as they are presented by the record in this cause, we are constrained to hold that there is nothing conclusive in the records of the association of such payments that the Wisniewskis received all or any part of the $3,000. Kolasinski alone testified as to the association's record of payments on the Wisniewski mortgage account, and, by reason of the nature and character of his testimony as to the delivery of the $3,000 check to Wisniewski, all of his testimony must be viewed with suspicion or entirely disregarded.

"We are of the opinion that the master erroneously excluded from the evidence the so-called claim against the Wisniewski estate in the probate court and its allowance. It tended to show that at the time the claim was made the support obligation of Kowalewski with misappropriating at least $3,000 advanced to him on Wisniewski's account. We think it was clearly admissible."

Plaintiff's case is based entirely upon the testimony of the secretary, Kolasinski. [illegible] inadmissibility of the unreliability of his testimony we now note from the master's transcript of the evidence that Kolasinski testified that he got alone first learned on October 2, 1930, that the trust deed of the Douglas Park Yards State Bank was still outstanding as a first lien against the property, notwithstanding that he signed and filed the claim against the Kowalewski estate in the Probate court on March 2, 1932. Although he signed and filed this claim he disclaimed knowledge of its contents, which were as follows:

"White Eagle Building and Loan Association
in account with Franco A. Kowalewski.

To cash advanced, c/o A. Kolpasse	" " "	[illegible]
" " " c/o [illegible]. Ostrowski	" " "	[illegible]
" " " c/o T. Tilitzek	" " "	[illegible]
" " " c/o L. Wisniewski	" " "	[illegible]
" " " c/o A. Martynowicz	" " "	[illegible]
" " " c/o W. Grzesczyk	" " "	[illegible]
Total		[illegible]

It will be seen from the foregoing that of interest [illegible]

in the Probate court included an item of $4,500 for "cash advanced to Kowalewski on account of J. Kwiatkowski." $4,500 was the amount due at that time as the balance of the principal notes secured by the trust deed. That Kowalewski as plaintiff's officer and agent was entrusted in the first instance with funds charged on the association's books to individuals transacting real estate loan business with it is clearly shown by this claim and that plaintiff knew that Kowalewski misappropriated the proceeds of the $8,000 Kwiatkowski check, or at least $4,500 of same, is conceded by the filing of the claim.

On the first hearing of this cause before the master when Kolesiak, plaintiff's secretary, was asked if he had turned over the $8,000 check to Kwiatkowski with the intention that he should "take up his first mortgage," he replied in the negative. This confirms defendants' theory that when Kowalewski and Kolesiak went to the Kwiatkowski home in the night time with the $8,000 check, they did not intend to leave it with Kwiatkowski and did not leave it with him, but went there merely to secure his indorsement so that the check might be turned over to Kowalewski to pay off the indebtedness secured by the trust deed and pay the balance of the proceeds of the check to the Kwiatkowskis.

In view of the fact that there is not a scintilla of reliable evidence in the record that the Kwiatkowskis ever received a cent of the $8,000, the payment of which their mortgage was given to secure, such mortgage must be held invalid and ineffective to create a lien against the premises involved herein.

It is under this mortgage that the decree seeks to foreclose defendants' equity in the property, and, while the decree does not find anything due and owing thereunder, foreclosure and sale are nevertheless ordered for failure to pay plaintiff the amount it expended in the purchase of the trust deed securing the notes of

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On the first hearing of this cause before the master when Kolesiak, plaintiff's secretary, was asked if he had turned over the $8,000 check to Kwiatkowski with the intention that he should "take up his first mortgage," he replied in the negative. This confirms defendants' theory that when Kowalewski and Kolesiak went to the Kwiatkowski home in the night time with the $8,000 check, they did not intend to leave it with Kwiatkowski and did not leave it with him, but went there merely to secure his indorsement so that the check might be turned over to Kowalewski to pay off the indebtedness secured by the trust deed and pay the balance of the proceeds of the check to the Kwiatkowskis.

In view of the fact that there is not a scintilla of reliable evidence in the record that the Kwiatkowskis ever received a cent of the $8,000, the payment of which their mortgage was given to secure, such mortgage must be held invalid and ineffective to create a lien against the premises involved herein.

It is under this mortgage that the decree seeks to foreclose defendants' equity in the property, and, while the decree does not find anything due and owing thereunder, foreclosure and sale are nevertheless ordered for failure to pay plaintiff the amount it expended in the purchase of the trust deed securing the notes of

the Peoples Stock Yards State Bank. The $8,000 mortgage being invalid ab initio cannot be effective to impress a lien on the property for money expended by plaintiff for any purpose.

There is one other question to be considered. Having no interest in the premises by reason of the $8,000 mortgage or otherwise was plaintiff's action in purchasing the notes and trust deed securing same from the Peoples Stock Yards State Bank ultra vires and unlawful?

Even though we assume that Kowalewski misappropriated only that portion of the proceeds of the $8,000 check necessary to discharge the lien of the outstanding trust deed and turned over to the Kwiatkowskis the balance of the proceeds, the $8,000 mortgage would still be invalid because of the existence of the lien of the trust deed when that mortgage was made. The statute under which plaintiff is organized to conduct its business prohibits loans on incumbered real estate. It must be borne in mind that, under the facts in this case, the Kwiatkowskis were under no duty to clear the property of the prior incumbrance and that the association entrusted that duty to its own agent, Kowalewski, whose failure to perform his duty and whose misappropriation of plaintiff's funds are responsible for the dilemma in which the association now finds itself.

Under the law building and loan associations are also prohibited from purchasing or otherwise acquiring outstanding mortgages against real estate except for the purpose of protecting some interest they already have in the particular property. No interest in the premises in question here having been vested in the association through the invalid $8,000 mortgage, plaintiff had no authority under the statute to invest its funds in the purchase of the trust deed and the notes secured by it.

In North Avenue Building Ass'n v. Huber, 270 Ill. 75, where a building association purchased from one Kemper an $18,000

the Peoples Stock Yards State Bank. The $8,000 mortgage being invalid ab initio cannot be effective to impress a lien on the property for money expended by plaintiff for any purpose.

There is one other question to be considered. Having no interest in the premises by reason of the $8,000 mortgage or otherwise was plaintiff's action in purchasing the notes and trust deed securing same from the Peoples Stock Yards State Bank ultra vires and unlawful?

Even though we assume that Lowelawski misappropriated only that portion of the proceeds of the $8,000 check necessary to discharge the lien of the outstanding trust deed and turned over to the Kwiatkowskis the balance of the proceeds, the $8,000 mortgage would still be invalid because of the existence of the lien of the trust deed when that mortgage was made. The statute under which plaintiff is organized to conduct its business prohibits loans on incumbered real estate. It must be borne in mind that, under the facts in this case, the Kwiatkowskis were under no duty to clear the property of the prior incumbrance and that the association entrusted this duty to its own agent, Lowelawski, whose failure to perform his duty and whose misappropriation of plaintiff's funds are responsible for the difficulty in which the association now finds itself.

Under the law building and loan associations are also prohibited from purchasing or otherwise acquiring outstanding mortgages against real estate except for the purpose of protecting some interest they already have in the particular property. No interest in the premises in question here having been vested in the association through the invalid $8,000 mortgage, plaintiff had no authority under the statute to invest its funds in the purchase of the trust deed and the notes secured by it.

In North Avenue Building Assn v. Ruber, 270 Ill. 76, where a building association purchased from one Ruber an $18,000

note and a trust deed securing it, which were executed by one Huber and his wife, and where upon the default of the Hubers in the payments due on said note, the association sought to foreclose the trust deed, the court in holding that the purchase by the building association of the note and trust deed was ultra vires and prohibited by statute, said at 79 and 82:

"The act under which the defendant in error building association was organized authorized it to loan its funds only to members of the association, and no loan was authorized to be made by the association in any sum in excess of the amount of stock held by the borrowing member. It is contended, however, by the association, that the loan was not made by it but was made by William Kemper and that the association bought the securities as an investment. * * * It is conceded the association was unauthorized to make loans to anyone except members of and stockholders in the association, but it is contended that the loan was made by Kemper, and that by the purchase of it from him the equitable title to it passed to the association; that the legal title remained in Kemper in trust for the use and benefit of the association, and said association had a right to have the trust deed foreclosed by Kemper as such trustee and for its use. Considering the loan as having been made by Kemper to the Hubers, the association had no more authority to purchase it than it would have had to make it in the first instance. The power of the association in loaning its money was expressly limited by the statute to making loans to its members, only, and this excluded the power to purchase notes of persons not members of the association. The attempted purchase of the note and trust deed was therefore unauthorized and ultra vires. * * *

"It seems clear under the decisions in this State, that if the trust deed had been made to secure a loan to the Hubers by the association no right to foreclose it would have been created. Is the association in any better position because the trust deed was made to secure a loan by Kemper and the securities purchased of him by the association? The association is in a court of equity asking equitable relief. Its alleged right to claim such relief grows out of its attempt to do an act which it had no authority to do. If it should be held, as insisted upon, that by the transaction the association became the equitable owner of the securities while the legal title still remained in Kemper, as trustee, for its use, and that by the transaction it became entitled to a foreclosure of the trust deed, it would establish a rule that the association could do indirectly what it is prohibited by law from doing directly. It is true, the Hubers have never paid the note and their moral obligation to pay it may be unaffected by the defense here interposed, but that would not justify holding the association is entitled to enforce payment by the remedy here sought to be pursued. Whatever the remedy of the association may be, we do not think it is by way of foreclosure in a court of equity. As said in National Home Building Ass'n v. Bank, (181 Ill. 35): 'No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.' See, also, Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24."

The Huber case is squarely in point and the law as held

note and a trust deed securing it, which were executed by one Huber and his wife, and where upon the default of the Hubers in the payments due on said note, the association sought to foreclose the trust deed, the court in holding that the purchase by the building association of the note and trust deed was *ultra vires* and prohibited by statute, said at 79 and 82:

"The act under which the defendant in error building association was organized authorized it to loan its funds only to members of the association, and no loan was authorized to be made by the association in any sum in excess of the amount of stock held by the borrowing member. It is contended, however, by the association, that the loan was not made by it but was made by William Kemper and that the association bought the securities as an investment. * * * It is conceded the association was unauthorized to make loans to anyone except members of and stockholders in the association, but it is contended that the loan was made by Kemper, and that by the purchase of it from him the equitable title to it passed to the association; that the legal title remained in Kemper in trust for the use and benefit of the association, and said association had a right to have the trust deed foreclosed by Kemper as such trustee and for its use. Considering the loan as having been made by Kemper to the Hubers, the association had no more authority to purchase it than it would have had to make it in the first instance. The power of the association in loaning its money was expressly limited by its statute to making loans to its members, only, and this excluded the power to purchase notes of persons not members of the association. The attempted purchase of the note and trust deed was therefore unauthorized and *ultra vires*. * * *

"It seems clear under the decisions in this state, that if the trust deed had been made to secure a loan to the Hubers by the association no right to foreclose it would have been conceded. In the association in any sense or position treating the trust deed was made to secure a loan by Kemper and the association as much and of him by the association. The association is in a court of equity seeking equitable relief. It alleged right to claim such relief from out of its attempt to do an act which it had no authority to do. It should be held, as insisted upon, that by the transaction the association came the equitable owner of the securities while the legal title still rested in Kemper, as trustee, for its use, and that by the transaction it became entitled to a foreclosure of the trust deed. It would seem clear that the association could do indirectly what it is prohibited by law from doing directly. It is true, the Hubers have never paid the note and their moral obligation to pay it may be unsatisfactory to the defense here interposed, but that would not justifully uplifting the association is entitled to enforce payment by the remedy here sought to be pursued. Whatever the remedy of the association may be, we do not think it is by a bill in equity in a court of equity. As said in National Home Building Ass'n v. Bank, (181 Ill. 33): 'No action can be maintained upon the unauthorized contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.' See, also, General Transportation Co. v. Chicago Car Co., 130 U. S. 24."

The Huber case is squarely in point and the law as held

therein bars foreclosure as a remedy to enforce payment from defendants of the amount paid by the association to the Peoples Stock Yards State Bank for the notes and the trust deed securing it, which was a first lien on the property. It is true that defendants have received the benefit of the association's payment of this indebtedness and that there may be a moral obligation on their part to pay it, "but that would not justify holding the association is entitled to enforce payment by the remedy here sought to be pursued."

The $8,000 mortgage being invalid and the purchase of the trust deed by the association being ultra vires and unlawful, both the mortgage and trust deed are unenforceable in a court of equity.

For the reasons stated herein the decree of the circuit court is reversed and the cause remanded with directions to dismiss plaintiff's cause for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

therein been foreclosure as a remedy to enforce payment from defendants of the amount paid by the association to the People's Stock Yards State Bank for the notes and the trust deed securing it, which was a first lien on the property. It is true that defendants have received the benefit of the association's payment of this indebtedness and that there may be a moral obligation on their part to pay it, "but that would not justify holding the association is entitled to enforce payment by the remedy here sought to be pursued."

The $8,000 mortgage being invalid and the purchase of the trust deed by the association being ultra vires and unlawful, both the mortgage and trust deed are unenforceable in a court of equity.

For the reasons stated herein the decree of the circuit court is reversed and the cause remanded with directions to dismiss plaintiff's cause for want of equity.

REVERSED AND REMANDED, WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.

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38360

CHICAGO BUTCHERS PACKING COMPANY, a corporation, Appellant, v. FRANK SLUNECKA, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 655

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, Chicago Butchers Packing Company, from a judgment entered by the municipal court in favor of defendant, Frank Slunecka, in an action tried by the court without a jury. Plaintiff filed this suit October 5, 1934, seeking to recover from defendant upon an oral contract of guaranty, alleged to have been made by defendant with plaintiff in connection with the sale of meat by plaintiff to the Czecho-Slovak Restaurant Company, a corporation, (hereinafter referred to as the restaurant company).

It appeared that the restaurant company was incorporated to engage in business commencing May, 1934, at the Century of Progress Exposition; that plaintiff's officers and manager were anxious to secure the business of supplying meat to this restaurant; that sometime in April, 1934, it was agreed, at a conference between the officers of the restaurant corporation and the officers of plaintiff, that the restaurant would purchase its meat from plaintiff and no guaranty of the restaurant company's account was either requested or given at that time; that defendant loaned $1,500 to the restaurant company, for which he received its note; that the next morning, after the aforesaid

28260

CHICAGO BUTCHER'S SUPPLY COMPANY, a corporation, Appellant,	
v.	APPEAL FROM MUNICIPAL
FRANK SLUNECKA, Appellee.	COURT OF CHICAGO.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, Chicago Butchers Supply Company, from a judgment entered by the municipal court in favor of defendant, Frank Slunecka, in an action tried by the court without a jury. Plaintiff filed this suit October 4, 1934, seeking to recover from defendant upon an oral contract of guaranty, alleged to have been made by defendant with plaintiff in connection with the sale of meat by plaintiff to the Steeno-Slovak Restaurant Company, a corporation, (hereinafter referred to as the restaurant company).

It appeared that the restaurant company was incorporated to engage in business commencing May, 1934, at the Century of Progress Exposition; that plaintiff's officers and manager were anxious to secure the business of supplying meat to this restaurant; that sometime in April, 1934, it was agreed, at a conference between the officers of the restaurant corporation and the officers of plaintiff, that the restaurant would purchase its meat from plaintiff and no guaranty of the restaurant company's account was either requested or given at that time; that defendant loaned $1,500 to the restaurant company, for which he received its note; that the next morning, after the morning

conference, defendant, who ran a butcher shop of his own and carried an individual account with plaintiff, of which he was a director, called at plaintiff's office and informed its manager and president that, notwithstanding the agreement at the conference the previous evening, the restaurant account was given to him; that he placed an initial order with plaintiff for two tons of meat for the restaurant company; that to obviate the necessity of otherwise paying truck hire for the delivery of the meat to the restaurant, plaintiff agreed with defendant to pay him one cent a pound for such delivery and subsequently credited his individual account with $400 so earned; that the first delivery of meat to the restaurant was May 25, 1934, and the last August 25, 1934; that the balance due plaintiff on the restaurant company's account is $1,665.94; that this account was carried on plaintiff's books in the name of the Czecho-Slovak Restaurant Company; that several cash payments were made by the restaurant company on its account; that plaintiff caused an action to be brought in the municipal court September 28, 1934, against the restaurant company, its officers and defendant for the balance due; and that October 2, 1934, a petition in bankruptcy was filed against the restaurant company in the United States District Court, in which proceeding plaintiff filed no claim.

Joseph T. Baitel, plaintiff's manager, testified that in April, 1934, in plaintiff's office, defendant "told me and my president that all merchandise, that is meats going to the Czecho-Slovak Restaurant he will be good for; he will guarantee that payment." He also testified that several times thereafter defendant stated that "if they don't pay that account, I will pay it; I guarantee that."

Jacob Botka, plaintiff's president, testified to like effect.

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Joseph T. Ratkal, plaintiff's manager, testified that in April, 1934, in plaintiff's office, defendant "told me and my president that all merchandise, that is meats going to the Cicero-Slovak Restaurant he will be good for; he will guarantee that payment." He also testified that several times thereafter defendant stated that "if they don't pay that account, I will pay it; I guarantee that."

Jacob Dobie, plaintiff's president, testified to like effect.

The defendant testified that whatever allowance he received on this account was in payment for his delivery of the meat to the restaurant company. He denied that he had guaranteed the account. He did state, however, that late in August, 1934, when the restaurant company owed a large balance and plaintiff threatened to shut down deliveries, he said, "I would guarantee it about the two days, about the 28th and 29th of August."

As stated in its brief plaintiff's claim "was based on the theory that in consideration of the allowance to defendant of 1¢ per pound (on) meat purchased by the restaurant company, defendant guaranteed the account of that company." This claim is refuted by the following testimony of plaintiff's manager on direct examination:

"Q. Who said that?
A. Mr. Slunecka.
Q. To whom did he say that?
A. To me and the president, and that minute he guaranteed the account. He said 'every merchandise that goes in there I will be good for.'
Q. What else was said?
A. That's all I heard.
Q. What was said about commissions?
A. The commissions came later. When we started sending him merchandise there, we found out we would have to have our trucks so Mr. Slunecka said, 'I will use my trucks and you will pay me one per cent commission;' the Chicago Butchers will pay him one per cent commission on all the merchandise that goes there."

His cross-examination was in part as follows:

"Q. You people, in order to save yourselves a driver's fee of $60.00 per week --,
A. It would not amount to that much
Q. -- whatever it is, suggested Mr. Slunecka use his trucks and deliver these meats to the Czecho-Slovak Restaurant?
A. That's true.
Q. And for that he was supposed to get one cent per pound for all the merchandise delivered?
A. That's true."

This evidence is convincing that defendant did not guarantee the account in consideration of the one cent a pound commission to be paid him on all the meat sold by plaintiff to the restaurant company. According to plaintiff's own testimony the matter of the

The defendant testified that whatever allowance he received on this account was in payment for his delivery of the meat to the restaurant company. He denied that he had guaranteed the account. He did state, however, that late in August, 1934, when the restaurant company owed a large balance and plaintiff threatened to shut down deliveries, he said, "I would guarantee it about the two days, about the 28th and 29th of August."

As stated in the brief plaintiff's claim "was based on the theory that in consideration of the allowance to defendant of 14 per pound (on) meat purchased by the restaurant company, defendant guaranteed the account of that company." This claim is refuted by the following testimony of plaintiff's manager on direct examination:

"Q. Who said that?
A. Mr. Simonds.
Q. To whom did he say that?
A. To me and the partner.
Q. What right is guaranteed the account. He said 'every merchandise that goes in there I will be good for.'
Q. What else was said?
A. That's all I heard.
Q. What was said about commissions?
A. The commissions came later. Then we started sending him merchandise there, we found out we would have to have our trucks so Mr. Simonds said, 'I will use my trucks and you will pay me one per cent commission;' the Chicago Butchers will pay him one per cent commission on all the merchandise that goes there."

His cross-examination was in part as follows:

"Q. You people, in order to save yourselves a driver's fee of $60.00 per week --.
A. It would not amount to that much
Q. -- whatever it is, suggested Mr. Simonds use his trucks and deliver these meats to the Chicago-Joliet Assortment?
A. That's true.
Q. And for that he was supposed to get one cent per pound for all the merchandise delivered?
A. That's true."

This evidence is convincing that defendant did not guarantee the account in consideration of the one cent a pound commission to be paid him on all the meat sold by plaintiff to the restaurant company. According to plaintiff's own testimony the matter of the

allowance to be paid defendant for the delivery of the meat came after his alleged oral guaranty and such allowance was not made as a commission for getting plaintiff the contract, but was in payment for the services of himself or his chauffeur and for the use of his truck in the delivery of the meat to the restaurant.

Even though we assume that plaintiff proved that defendant agreed orally to guarantee this account, does any liability attach? In his affidavit of merits defendant alleged "that the aforesaid undertaking and promises were not in writing as by statute * * * provided and that the same comes within the Statute of Frauds." Thus the real issue presented is whether the Statute of Frauds constitutes a complete defense to plaintiff's action.

Where goods have been sold to one person on the oral promise of another to be answerable therefor, a decisive test as to the application of the Statute of Frauds is afforded by the determination of the question on whose credit the goods were sold. It is requisite that credit should be given exclusively to the promissor; if any credit is given to him for whose benefit the promise is made, the promise is collateral and within the statute. (Brown v. Reinberger, 177 Ill. App. 297; Combs v. Pulliam, 190 Ill. App. 350; Dubos Paper Co. v. Flint, 207 Ill. App. 367; Hughes v. Atkins, 41 Ill. 213; Lusk v. Throop, 189 Ill. 127; 27 Corpus Juris, 142.)

Whether an undertaking is original or collateral is to be determined not from the words used, but from all the circumstances attending the transaction. (Bonner-Marshall Co. v. Hansell, 189 Ill. App. 474.) From what has been heretofore stated, it is quite obvious that credit for the merchandise delivered to the restaurant company was not given exclusively

allowance to be paid defendant for the delivery of the meat came after his alleged oral guaranty and such allowance was not made as a commission for getting plaintiff the contract, but was in payment for the services of himself or his chauffeur and for the use of his truck in the delivery of the meat to the restaurant.

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Where goods have been sold to one person on the oral promise of another to be answerable therefor, a decisive test as to the application of the statute of Frauds is afforded by the determination of the question on whose credit the goods were sold. It is requisite that credit should be given exclusively to the promisor; if any credit is given to him for whose benefit the promise is made, the promise is collateral and within the statute. (Brown v. Reinberger, 177 Ill. App. 397; Combs v. Zullian, 190 Ill. App. 390; Dubee Paper Co. v. Wilms, 207 Ill. App. 367; Mathes v. Atkins, 41 Ill. 213; Lusk v. Throop, 189 Ill. 127; 27 Corpus Juris, 142.)

Whether an undertaking is original or collateral is to be determined not from the words used, but from all the circumstances attending the transaction. (Donner-Hanna Co. v. Russell, 189 Ill. App. 474.) From what has been heretofore stated, it is quite obvious that credit for the merchandise delivered to the restaurant company was not given exclusively

to defendant, if at all. Plaintiff was anxious to get and agreed to take the contract in the first instance without a guaranty. The charges and credits on this account appeared on plaintiff's books in the name of the restaurant company. Weekly statements of the account were sent to the restaurant company and if duplicates of same were sent to defendant, it is fair to assume that this was done to afford him an opportunity of checking against them to compute his delivery charges. The restaurant company made several cash payments on the account; defendant made none. There is not a single circumstance in the case that affords either a logical or sensible reason for defendant's guaranty of the account.

In 27 Corpus Juris, 142, it is stated that "in all such cases it is requisite that credit should be given exclusively to the promissor; if any credit is given to him for whose benefit the promise is made the promise is collateral and within the statute * * *."

In Price v. Chicago M. & St. P. Ry. Co., 40 Mo. App. 189, the court held:

> "The person for whose benefit the promise is made must not be credited (charged) and must not be regarded by the plaintiff as a debtor. His position must be such that he could not be held liable were an action brought against him for the debt."

Prior to filing the instant suit plaintiff brought an action against the Czecho- Slovak Restaurant Company, its officers and defendant. Its conduct in that regard is hardly compatible with the principle enunciated in the Price case and indicates that plaintiff's officers did not themselves consider that credit on this account was extended exclusively to defendant.

In determining to whom credit was given as between defendant, the alleged promissor, and the restaurant company, for whose benefit the alleged promise was made, it is important to consider the manner in which plaintiff entered the transactions on its books.

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In 27 Corpus Juris, 142, it is stated that "in all such cases it is requisite that credit should be given primarily to the promisor; if any credit is given to him for whose benefit the promise in made the promise is collateral and within the statute * * *."

In Price v. Chicago N. & T. R. Co., 60 Ga. 132, the court held:

> "The person for whose benefit the promise is made must not be credited (charged) and must not be regarded by the plaintiff as a debtor. His position must be such that he could not be held liable were an action brought against him for the debt."

Prior to filing the instant suit plaintiff brought an action against the Dando- Glover Restaurant Company, its officers and defendant. Its conduct in that regard is hardly compatible with the principle enunciated in the Price case and indicates that plaintiff's officers did not immediately consider that credit on this account was extended primarily to defendant.

In determining to whom credit was given as between defendant, the alleged promisor, and the restaurant company, for whose benefit the alleged promise was made, it is of importance to consider the manner in which plaintiff entered the transaction on its books.

Every item comprised in this account was entered on plaintiff's books in the name of the restaurant company only and no charge was made on its books against defendant for meat delivered to the restaurant. Daily invoices of the meat delivered and weekly statements showing the condition of the account were made out in the name of the restaurant company and delivered to it. If one has a claim against another and keeps books, it will so appear on the books and will require very strong evidence to show that the entry was made by mistake. (Bonner-Marshall Co. v. Hansell, supra.) No satisfactory evidence appears in the record showing that any entry in this account was mistakenly made.

The facts and circumstances in evidence in this case are not convincing that defendant undertook, either originally or collaterally, to pay the restaurant company's indebtedness to plaintiff. Even though we assume that defendant made some manner of promise to pay this account, it could only have been collateral and clearly within the Statute of Frauds. There is not a single aspect of the case that is convincing in even the slightest degree that defendant primarily undertook to secure credit from plaintiff for the restaurant company or to pay its account. No reasonable motive is suggested for his so doing. Plaintiff's theory that defendant guaranteed the account because he was to get one cent a pound on all meat sold and delivered to the restaurant is refuted by its own evidence that the agreement to pay defendant came after the alleged oral promise of guaranty and was in consideration of his delivery of the meat.

For the reasons stated herein the judgment of the municipal court is affirmed.

AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

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The facts and circumstances in evidence in this case are not convincing that defendant undertook, either originally or collaterally, to pay the restaurant company's indebtedness to plaintiff. Even though we assume that defendant made some manner of promise to pay this account, it could only have been collateral and clearly within the statute of frauds. There is not a single aspect of the case that is convincing in even the slightest degree that defendant primarily undertook to assume credit from plaintiff for the restaurant company or to pay its account. No reasonable motive is suggested for his so doing. Plaintiff's theory that defendant guaranteed the account because he was to get one cent a pound on all meat sold and delivered to the restaurant is refuted by its own evidence that the agreement to pay defendant came after the alleged oral promise of guaranty and was in consideration of his delivery of the meat.

For the reasons stated herein the judgment of the municipal court is affirmed.

AFFIRMED.

Beasley, P. J., and Byrd, J., concur.

38448

DANIEL G. HUNTER,
Appellee,

v.

JOHN H. HILL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

284 I.A. 655

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

October 4, 1928, plaintiff, Daniel G. Hunter, secured a judgment by confession against defendant, attorney John H. Hill, for $2,944. February 11, 1935, and February 27, 1936, affidavits for garnishee summonses were served on certain tenants of a building who, it was claimed, were indebted to defendant as his lessees. April 15, 1935, defendant filed an intervening petition in which he set forth that he did not own and had no interest in the premises in question and that the control, operation and management of the buildings on such premises were turned over to him as trustee for certain definite purposes. Plaintiff's motion to strike defendant's intervening petition was sustained April 15, 1935, and judgments were entered against two of the garnishees.

Defendant seeks by this proceeding to reverse the order of April 15, 1935, striking his intervening petition and entering judgments against the garnishees. April 18, 1935, an order was entered containing the following language:

"Now comes the defendant and prays an appeal from the order of April 15th, 1935, to the Appellate Court in and for the First District of Illinois, which appeal is granted on condition that said party file herein an appeal bond conditioned according to the law in the sum of $300, with security to be approved by this court, said bond to be approved and filed herein within 20 days from this date. It is further ordered by the Court that 60 days be allowed in which to file Bill of Exceptions."

38448

DANIEL G. BURKE,
Appellee,

v.

JOHN E. HILL,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

284 I.A. 655

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

October 4, 1938, plaintiff, Daniel G. Burke, secured a judgment by confession against defendant, attorney John E. Hill, for $2,044. February 11, 1938, and February 27, 1938, affidavits for garnishee summonses were served on certain tenants of a building who, it was claimed, were indebted to defendant as his lessees. April 15, 1938, defendant filed an intervening petition in which he set forth that he did not own and had no interest in the premises in question and that the control, operation and management of the buildings on such premises were turned over to him as trustee for certain definite purposes. Plaintiff's motion to strike defendant's intervening petition was sustained April 15, 1938, and judgments were entered against two of the garnishees.

Defendant seeks by this proceeding to reverse the order of April 15, 1938, striking his intervening petition and entering judgments against the garnishees. April 15, 1938, an order was entered containing the following language:

"Now comes the defendant and prays an appeal from the order of April 15th, 1938, to the Appellate Court in and for the First District of Illinois, which appeal is granted on condition that said party file herein an appeal bond conditioned according to the law in the sum of $300, with security to be approved by this court, said bond to be approved and filed herein within 20 days from this date. It is further ordered by the Court that 60 days be allowed in which to file bill of exceptions."

Defendant filed no notice of appeal as required by the Civil Practice act, but sought to perfect an appeal of this cause by merely having approved and filing an appeal bond, and having transmitted within apt time to the clerk of the Appellate court by the clerk of the Municipal court the record, including a report of the proceedings at the trial.

August 8, 1935, plaintiff filed in this court his written motion to dismiss this proceeding, and on October 14, 1935, his motion that this cause be stricken from the docket on the ground that no notice of appeal was filed in the trial court. Both of these motions were reserved to hearing.

It does not appear from the record that a notice of appeal was filed within ninety days after the date of the order and judgment which defendant seeks to reverse, and it is admitted that no notice of appeal has ever been filed.

Subdivision 1, sec. 74, of the Civil Practice act, provides:

"Every order, determination, decision, judgment or decree, rendered in any civil proceeding, if reviewable by the Supreme or Appellate court of this State by writ of error, appeal or otherwise, shall hereafter be subject to review by notice of appeal, and such review shall be designated an appeal and shall constitute a continuation of the proceeding in the court below. ***"

Subdivision 2, sec. 76, provides:

"An appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court. After being duly perfected no appeal shall be dismissed without notice, and no step other than that by which the appeal is perfected shall be deemed jurisdictional."

The first above quoted section of the act clearly specifies that defendant's exclusive method of review of the trial court's order and judgment was by notice of appeal, and the latter section that the filing of such notice of appeal "shall be deemed jurisdictional."

In Wishard v. School Directors, 279 Ill. App. 333, where no notice of appeal had been filed, the court said at 334, 335:

"In Veach v. Hendricks, 278 Ill. App. 376, an opinion

Defendant filed no notice of appeal as required by the Civil Practice act, but sought to perfect an appeal of this cause by merely having approved and filing an appeal bond, and having transmitted within apt time to the clerk of the Appellate court by the clerk of the Municipal court the record, including a report of the proceedings at the trial.

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In Wisbard v. School Directors, 279 Ill. App. 333, where no notice of appeal had been filed, the court said at 334, 335:

"In Veach v. Hendricks, 278 Ill. App. 376, an opinion

filed at the October term of this court, we reviewed the various sections of the Civil Practice Act and rules of court in reference to the notice of appeal and there said 'that the filing of a notice of appeal is jurisdictional and that the proceedings of the lower court cannot be reviewed on appeal unless such notice has been filed. The right of appeal is purely statutory and the statute granting such right must be strictly complied with. Hall v. First Nat. Bank, 330 Ill. 234; Davison v. Heinrich, 340 Ill. 349.'

"* * *

"Under the foregoing authorities, this court has no jurisdiction to consider the case in the absence of a notice of appeal. It is a requirement of the statute and is a matter that cannot be waived by agreement of parties nor supplied by estoppel arising out of the conduct of either party."

Plaintiff also filed in this court on October 8, 1935, a motion to dismiss this appeal, which was denied at that time. After due and careful reconsideration of the matter our order denying that motion is at this time vacated and set aside.

Inasmuch as no appeal has been perfected there is nothing to dismiss. The order therefore will be that the case be stricken from the docket.

CAUSE STRICKEN.

Scanlan, P. J., and Friend, J., concur.

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"* * *

"Under the foregoing authorities, this court has no jurisdiction to consider the case in the absence of a notice of appeal. It is a requirement of the statute and in a matter that cannot be waived by agreement of parties nor supplied by autopsy stating out of the conduct of either party."

Plaintiff also filed in this court on October 8, 1958, a motion to dismiss this appeal, which was denied at that time. After due and careful reconsideration of the matter our order denying that motion is at this time vacated and set aside.

Inasmuch as no appeal has been perfected there is nothing to dismiss. The order therefore will be that the case be stricken from the docket.

ORDER ACCORDING.

Scanlan, P. J., and Friend, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

284 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 8962 Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1936

William H. Ashelford, Herman Ashelford and Walter Ashelford, co-partners doing business under the name and style of Byron Sand and Stone Company,

Appellees,

Appeal from the Circuit Court of Ogle County.

vs.

Illinois Northern Utilities Company, a Corporation,

Appellant.

OPINION AS MODIFIED ON PETITION FOR REHEARING

DOVE, J.

The evidence in this case discloses that the plaintiffs are a partnership, doing business as the Byron Sand and Stone Company and that they owned a sand and gravel pit which they had equipped at great expense with machinery and appliances to be run by electricity, and the defendant is a public utility engaged in selling electric current and is the only source from which the plaintiffs could obtain the electric power necessary to successfully operate their business.

It further appears from the evidence that on February 21st, 1928, the parties entered into a written contract by the terms of which the defendant agreed to furnish the plaintiff at the then legal rates such electrical energy as the plaintiff might require. This contract contained the following provisions, viz: "The obligation of both parties hereunder shall commence on the date when the company begins to supply electricity hereunder (such date to be about March 15th, 1928) and shall continue for a fixed term of five years, and

[illegible]

[illegible]

[illegible] 1. 1933

[illegible]

[illegible]
Ashefore and [illegible] Ashefore,
co-partners doing business under
the name and style of [illegible]
and Stone Company,

[illegible] Circuit
[illegible] Court of Cook County.

[illegible],

vs.

Illinois Northern Utilities
Company, a Corporation,

[illegible].

[illegible]

OPINION [illegible]

[illegible], J.

The evidence in this case [illegible]
a partnership, doing business [illegible]
and that they owned [illegible] equipped
at least operated with [illegible]
electricity, and are [illegible] engaged in
selling electric current [illegible]
plaintiffs could sell in the [illegible] necessary to successfully
operate their business.

In further [illegible] 1933, the parties [illegible] of
which the [illegible] rates such [illegible] frequency. This
contract [illegible] of both parties [illegible] begins to supply electric [illegible] 13th, 1933) [illegible] the [illegible]

after the expiration of such fixed time until 30 days after the receipt by either party of written notice to discontinue service." And it was stipulated upon the hearing of this case that the defendant began to supply electricity on April 30, 1928. The contract further provided that as soon as practical after the end of each month the defendant would render a bill to the plaintiffs for the amount due for such month and the plaintiffs agreed to pay same within ten days thereafter. It was also provided in the contract that "A 'month' under this contract shall mean the period between any two consecutive regular readings by the Company of the meters at the premises, such readings to be taken as nearly as may be practicable, every thirty days". Under the head of "Minimum Charge" the contract contained this provision, viz: "Notwithstanding anything to the contrary hereinbefore contained, the customer agrees to pay for each month's service hereunder, a minimum of 50 cents per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, provided, that at the customer's option and upon his signing the statement printed below, the customer shall pay a yearly minimum charge of $8.00 per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, and in such case, if at the end of any year of the contract term it appears that the total payments hereunder for the year shall not have amounted to the total minimum charge for the year, the customer shall, upon bill rendered, promptly pay the difference". The "Statement Printed Below" reads: "The customer hereby elects to pay a yearly minimum charge as hereinbefore specified instead of a monthly minimum charge". This was signed by the plaintiffs. The provision for terminating the contract for violation of its provisions is as follows, viz: "If the customer shall fail to comply with or perform any of the conditions or obligations hereof on the customers part to be complied with or performed, and after such failure the company shall deliver at said premises, addressed to the customer, a written notice of its intention to cut off the supply of electricity on account of such failure, then the company shall have the right to cut

after the expiration of such fixed time until 30 days after the receipt by either party of written notice to discontinue service." And it was stipulated upon the hearing of this case that the defendant began to supply electricity on April 30, 1923. The contract further provided that as soon as practical after the end of each month the defendant would render a bill to the plaintiffs for the amount due for such month and the plaintiffs agreed to pay same within ten days thereafter. It was also provided in the contract that "A 'month' under this contract shall mean the period between any two consecutive regular readings by the Company of the meters at the premises, such readings to be taken as nearly as may be practicable, every thirty days". Under the head of "Minimum Charge" the contract contained this provision, viz: "Notwithstanding anything to the contrary hereinbefore contained, the customer agrees to pay for each month's service hereunder, a minimum of 50 cents per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, provided, that at the customer's option and upon his signing the statement printed below, the customer shall pay a yearly minimum charge of $2.00 per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, and in such case, if at the end of any year of the contract term it appears that the total payments hereunder for the year shall not have amounted to the total minimum charge for the year, the customer shall, upon bill rendered, promptly pay the difference". The "Statement Printed Below" reads: "The customer hereby elects to pay a yearly minimum charge as hereinbefore specified instead of a monthly minimum charge". It was signed by the plaintiffs. The provision for terminating the contract for violation of its provisions is as follows, viz: "If the customer shall fail to comply with or perform any of the conditions or obligations hereof on the customers part to be complied with or performed, and after such failure the company shall deliver at said premises, addressed to the customer, a written notice of its intention to cut

off the supply at the expiration of five days after the giving of said notice (such 5 days being deemed 'due notice' for the purposes hereof) unless within such five days the customer shall make good such failure. Cutting off the supply of electricity for any such cause shall terminate this contract."

The evidence further discloses that under the date of October 16th, 1928 one of the plaintiffs wrote the defendant: "Please be advised from this date that we are going to shut down our washing and screening plant, and have no further use of electricity, or electrical energy. Please send me bill for Oct. up to this time and I will send you check for same". To which the defendant replied on Oct. 19th, 1928: "Your communication of October 16th has come to me by reference. You are privileged to shut down your plant and will, of course, not have to pay any bill for such months as your plant is down. You have guaranteed a yearly minimum of $1632.00. In view of the fact that you received your first bill June 1, 1928, you have until June 1, 1929 to use up the $1632.00 worth of current. On that date, if you have not used this amount of current, you will be billed for the difference between $1632.00 and the amount you have paid. (Both parties agree this figure should be $1600.00). From a study of your contract you willfind it is a five year agreement so that if you wish to discontinue service now, your minimum bills for the entire five years minus what cash you have paid us, will become immediately due and payable and it is only on the payment of such sum that we would discontinue your service. If your plant is not operated for the few winter months you will have no bills, except for the minimum proposition as explained above, which becomes due next June."

It further appears from the evidence that the minimum yearly charge for current had been increased from $1600.00 to $1800.00 by reason of attaching another motor prior to the year beginning in June, 1931 and upon the hearing it was stipulated that the monthly

off the supply at the expiration of five days after the giving of said notice (such 5 days being deemed 'due notice' for the purposes hereof) unless within such five days the customer shall make good such failure. Cutting off the supply of electricity for any such cause shall terminate this contract."

The evidence further discloses that under the date of October 16th, 1928 one of the plaintiffs wrote the defendant: "Please be advised from this date that we are going to shut down our washing and screening plant, and have no further use of electricity, or electrical energy. Please send me bill for fot. up to this time and I will send you check for same". To which the defendant replied on Oct. 18th, 1928: "Your communication of October 16th has come to me by reference. You are privileged to shut down your plant and will, of course, not have to pay any bill for such months as your plant is down. You have guaranteed a yearly minimum of $1832.00. In view of the fact that you received your first bill June 1, 1928, you have until June 1, 1929 to use up the $1832.00 worth of current. On that date, if you have not used this amount of current, you will be billed for the difference between $1832.00 and the amount you have paid. (Both parties agree this figure should be $1800.00). From a study of your contract you will find it is a five year agreement so that if you wish to discontinue service now, your minimum bills for the entire five years minus what you have paid us, will become immediately due and payable and it is only in the payment of such sum that we would discontinue your service. If your plant is not operated for the few months you will have no bills, except for the minimum [illegible] a duplicated now, which becomes due next June."

It further appears from the evidence that the minimum yearly charge for current had been increased from $1800.00 to $1850.00 by reason of attaching another motor which [illegible] the year beginning in June, 1931 and upon the hearing it was argued [illegible] that [illegible]

statements rendered by the defendant to the plaintiffs after April 30, 1928, to and including November 12, 1931, aggregated $8030.64 and were all paid by the plaintiffs. That on August 4, 1931 a bill was rendered by the defendant and the plaintiffs paid $555.89, that on November 1, 1931 a bill for $495.21 was rendered by the defendant and paid by the plaintiffs, that on November 12, 1931 the defendant rendered to the plaintiffs a bill for $122.53, which the plaintiffs paid. It further appears from the evidence that the plaintiffs operated their plant from three to six months each year and as a practical arrangement when the plant was closed in the fall the company was notified and the service was cut off and when operations at the plant were resumed in the spring the defendant made the power available. In 1928, the first year of the contract, plaintiffs operated their plant between three and four months. In 1929 the plant was operated five or six months. In 1930 the plaintiffs operated their plant six months and in 1931 the operation of the plant ceased at the time the meter was read and the bill of November 12, 1931 was rendered.

The evidence is further that on February 23, 1932 the defendant sent a statement to the plaintiffs claiming that the plaintiffs were indebted to the company in the sum of $626.37. This amount was arrived at by the company charging the plaintiffs at this time with the minimum charge for the years 1931-2 on 225 horse power at $8.00 per horse power, making a total of $1800.00 and crediting the plaintiffs with the payments of $55.89 on August 4, 1931, $495.21 on November 1, 1931 and $122.53 on November 12, 1931. These three payments aggregate $1173.63 and the difference between this amount and the minimum charge of $1800.00 is $626.37, and it was this amount that the company, on February 23, 1932, insisted was due it under the provisions of its contract. The plaintiffs refused to pay, contending they were not at that time, indebted to the defendant, and requested the defendant to furnish them with current. On March 23, 1932, the defendant again demanded payment and again the plaintiffs requested current, which defendant refused. Again on May 5,

statements rendered by the defendant to the plaintiffs after April 30, 1928, to and including November 12, 1931, aggregated $8030.64 and were all paid by the plaintiffs. That on August 4, 1931 a bill was rendered by the defendant and the plaintiffs paid $888.88, that on November 1, 1931 a bill for $488.21 was rendered by the defendant and paid by the plaintiffs, that on November 12, 1931 the defendant rendered to the plaintiffs a bill for $182.88, which the plaintiffs paid. It further appears from the evidence that the plaintiffs operated their plant from three to six months each year and as a practical arrangement when the plant was closed in the fall the company was notified and the service was cut off and when operations at the plant were resumed in the spring the defendant made the power available. In 1928, the first year of the contract, plaintiffs operated their plant between three and four months. In 1929 the plant was operated five or six months. In 1930 the plaintiffs operated their plant six months and in 1931 the operation of the plant ceased at the time the motor was read and the bill of November 12, 1931 was rendered.

The evidence is further that on February 28, 1928 the defendant sent a statement to the plaintiffs claiming that the plaintiffs were indebted to the company in the sum of $[illegible]. This amount was arrived at by the company charging the plaintiffs at this time with the minimum charge for the years 1921-2 in the horse power at $8.00 per horse power, making a total of $[illegible] and crediting the plaintiffs with the payments of $88.89 on August 4, 1931, $[illegible] on November 1, 1931 and $182.88 on November 12, 1931. These three payments aggregate $[illegible] and the difference between this amount and the minimum charge of $1800.00 is $[illegible], and it was this amount that the company, on February 28, 1928, claimed was due it under the provisions of the contract. The plaintiffs [illegible] contending they were not at that time, indebted to the defendant, and requested the defendant to furnish them with [illegible]. On March 23, 1928, the defendant again demanded payment [illegible] the plaintiffs rendered account, which defendant refused. [illegible] May 5,

1932 defendants rendered their bill to the plaintiffs for said sum of $626.37 and demanded payment thereof, which the plaintiffs refused and the defendant having refused to furnish the plaintiffs with current, this suit was thereafter instituted by the plaintiffs to recover damages they alleged to have sustained by reason of defendant's refusal to furnish electrical current as provided by the contract. The case went to trial upon an amended declaration consisting of two counts in tort. The defendant filed a plea of the general issue and a sworn plea denying the execution of the contract. The court required the plaintiffs to furnish a bill of particulars in which several specific items of damage were set forth and punitive or exemplary damages were insisted upon because of the claimed willful and wanton conduct of the defendant. The issues were submitted to a jury, resulting in a general verdict in favor of the plaintiff for $10,375.00. A special interrogatory was also submitted to the jury which was: "Do the jury, as a matter of fact, find that the defendant was guilty of wilful and wanton misconduct in refusing to furnish electrical current to the plaintiffs"? This interrogatory was answered in the affirmative. Upon a motion for a new trial, a remittitur of $4,375.00 was ordered by the trial court and upon this being done, judgment for $6,000.00 was rendered against the defendant and the record is in this court for review by appeal.

Counsel for appellant insist that its letter of October 19, 1928 was improperly admitted in evidence as it tended to vary or modify the plain and unambiguous contract of the parties. Furthermore it is insisted that the party who wrote that letter was without authority to bind appellant. Appellant also contends that it was justified under the contract in refusing to furnish appellees electrical current until they paid it said sum of $626.37 and finally insists that the trial court erred in submitting to the jury the special interrogatory.

1932 defendants tendered their bill to the plaintiffs for said sum of $838.37 and demanded payment thereof, which the plaintiffs refused and the defendant having refused to furnish the plaintiffs with current, this suit was thereafter instituted by the plaintiffs to recover damages they alleged to have sustained by reason of defendant's refusal to furnish electrical current as provided by the contract. The case went to trial upon an amended declaration consisting of two counts in tort. The defendant filed a plea of the general issue and a sworn plea denying the execution of the contract. The court required the plaintiffs to furnish a bill of particulars in which several specific items of damage were set forth and punitive or exemplary damages were insisted upon because of the claimed willful and wanton conduct of the defendant. The issues were submitted to a jury, resulting in a general verdict in favor of the plaintiff for $10,275.00. A special interrogatory was also submitted to the jury which was: "Do the jury, as a matter of fact, find that the defendant was guilty of willful and wanton misconduct in refusing to furnish electrical current to the plaintiffs?" This interrogatory was answered in the affirmative. Upon a motion for a new trial, a remittitur of $2,275.00 was ordered by the trial court and upon this being done, judgment for $8,000.00 was rendered against the defendant and the record is in this court for review by appeal.

Counsel for appellants insist that the letter of October 19, 1932 was improperly admitted in evidence as it tended to vary or modify the plain and unambiguous contract of the parties. Further-more it is insisted that the party who wrote that letter was without authority to bind appellants. Appellant also contends that it was justified under the contract in refusing to furnish or release electrical current until they paid it a sum of $838.37 and finally insists that the trial court erred in submitting to the jury the special interrogatory.

The controlling facts in this case are not in dispute. The contract was duly executed by the parties hereto. It provided that the obligation assumed by each party should commence when the company begins to supply electricity thereunder and should continue for at least a fixed period of five years. Appellant began to supply electricity on April 30, 1928 and under the contract appellant was obligated to render a bill as soon as practical after the close of each month and appellees were obligated to pay appellant for the current so used within ten days after the receipt of the bill. It is true that the record discloses that the parties had some controversy about the bills while the contract was in force, but it is conceded that appellees paid and appellant received from them the full amount due appellant under the provisions of the contract up to and including November 12, 1931, at which time the current was, by consent of both parties, discontinued, the plant of appellees being at that time shut down for the winter. In our opinion the letter of appellant of October 19, 1928 was properly admitted in evidence. The contract provided that if at the end of any year the total payments made thereunder for the year should not amount to the total minimum charge, that then appellees should, upon bill rendered, pay the difference. We are at a loss to understand how appellant under the wording of this contract and the conceded facts as they appear in this record could insist, on February 23, 1932, that there was any sum due it from appellees. Giving the contract the construction most favorable to appellant, the contract year could not have ended prior to April 30, 1932 and in view of the language used in the contract, the letter of October 19, 1928, in which appellant told appellee just what its construction of the contract was, was properly received in evidence. Consolidated Coal Co. v. Schneider, 163 Ill. 393. This letter of appellant was written to appellees in reply to their request of October 16, 1928, in which they advised appellant that they were going to shut down their plant and asked for a bill to that date. If appellant then understood that the contract year ended at any time prior to June 1,

The controlling facts in this case are not in dispute. The contract was duly executed by the parties hereto. It provides that the obligation assumed by each party should commence when the company begins to supply electricity thereunder and should continue for at least a fixed period of five years. Appellant began to supply electricity on April 30, 1915 and under the contract appellant was obligated to render a bill as soon as practical after the close of each month and appellees were obligated to pay appellant for the current so used within ten days after the receipt of the bill. It is true that the record discloses that the parties had some controversy about the bills while the contract was in force, but it is conceded that appellees paid and appellant received from them the full amount due appellant under the provisions of the contract up to and including November 15, 1921, at which time the current was, by consent of both parties, discontinued, the plant of appellees being at that time put down for the winter. In our opinion the letter of appellant of November 15, 1920 was properly admitted in evidence. The contract provides, that if the sum of any year the total expense of the [illegible] shall not amount to the total minimum charge, [illegible] according upon bill rendered, by the [illegible]. [illegible] to understand how appellant under the [illegible] of this contract [illegible] the [illegible] coded facts as they appear in the record. On February 20, 1920, after there was [illegible] it is [illegible]. [illegible] the contract the [illegible] contract year [illegible] in view of the [illegible] 15, 1920, [illegible] of the contract was, [illegible] Oscar Dam v. Commonwealth Edison Co. [illegible] written to appellees in [illegible] in which they [illegible] their plant [illegible] understood that the contract year [illegible]

he would not have written that "in view of the fact that you received your first bill on June 1, 1928, you have until June 1, 1929" to use up the yearly minimum charge and if on that date appellees had not used up that amount of current, they would then be billed by appellant for the difference between the yearly minimum and the amount they had paid. This could only mean that the next yearly period would begin June 1, 1929, and that each subsequent yearly period would begin on June 1st, unless the time of beginning should be changed. Such being the case, and no change having been made, the fourth yearly period began June 1st, 1931 and ended June 1, 1932 and the bill for $626.37 was prematurely rendered February 23rd, March 23rd and May 5th, 1932. The plaintiffs were not at those times in default and it was therefore the duty of the defendant under its contract to turn on the electricity when notified so to do and it is conceded that such notice was given in writing on May 9, 1932.

For its failure to perform that duty the plaintiffs were entitled to recover such damages as resulted therefrom, and the judgment was justifiedunder the evidence as found in this record.

We are not unmindful of the claim, made by appellant, that W. D. Hart, who wrote the letter of October 19th, 1928, had no authority to bind the defendant by making or consenting to any change in the contract nor to interpret it as "A five year agreement" and fix the beginning of the first year as of June 1st, 1928. This letter was signed: "W. D. Hart General Contract Agent" and he is the same individual who signed the contract which forms the basis of this suit. That contract is signed "Illinois Northern Utilities Company by W. D. Hart" and the clause of that contract just above the signature reads: "This contract, although signed, is subject to the approval of the General Contract Agent of the Company, and shall not be binding upon the Company until endorsed with his approval." And it is endorsed: "Approved 2/21/1928 Illinois Northern Utilities Co. by: W. D. Hart General Contract Agent."

The appellant company adopted the contract and there can be no doubt that so far as it is concerned W. D. Hart had full authority to do anything the Company could have done in connection with it at the time it was executed or at any time thereafter while it was still executory.

Appellant finally insists that the evidence in this record discloses that there was an honest dispute between the parties hereto and that it was justified in refusing to furnish appellees current as the bill it rendered appellee on February 23, 1932, March 23, 1932 and May 5, 1932 represented the balance due the company on the yearly minimum charge from March 1, 1931 to March 1, 1932 and that therefore the trial court erred in submitting to the jury the special interrogatory in answer to which the jury found appellant guilty of wilful and wanton misconduct in refusing to furnish electrical current to appellees. There is no merit in this contention. No yearly minimum charge could possibly have been due appellant under the contract on March 1, 1932 but if there was an honest difference of opinion as to the rights of the parties under the provisions of the contract, there was a way available to have the matter determined without refusing to supply appellees that which appellant had but without which appellees' plant was worthless. Whether certain facts constitute wilfulness and wantonness is a question of fact for the jury, Voorhees v. C. and A. Ry. Co., 215 Ill. App. 534, and the evidence in this record, in our opinion, justified the jury in answering the special interrogatory as it did.

The amount of the judgment is clearly within the scope of the evidence and finding no substantital error in the record, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

The appellant company employed the contract and made use of no doubt that so far as it is concerned W. M. Kerr had full authority to do anything the company could have done in connection with it at the time it was executed or at any time thereafter while it was still executory.

Appellant finally insists that the evidence in this record discloses that there is an honest dispute between the parties hereto and that it was justified in refusing to further [illegible] the bill it remanded appellee on February 6, 1923, [illegible] and May 5, 1923 represented the balance due the company on the yearly minimum charge for March 1, [illegible] to March 1, 1923 and that therefore the trial court erred in submitting to the jury the question of interrogatory in answer to which the jury found appellant guilty of willful and wanton misconduct in refusing to [illegible] to appellee. There is no doubt in this correspondence. A yearly minimum charge could possibly have been the agreement under the contract on March 1, 1923 but it [illegible] was an honest difference of opinion as to the rights of the parties. [illegible] the provision in the contract, there was a way available to [illegible] a settlement [illegible] to apply [illegible] and [illegible] appellees' plant [illegible] contract [illegible] willfulness and wantonness is a question of fact for the jury, [illegible] v. C. and A. Ry. Co., 248 Ill. App. 524, and [illegible] in the record, in our opinion, justifies the jury in [illegible] the interrogatory as it did.

The amount of the judgment is [illegible] the evidence in [illegible] as stated [illegible] judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and thirty-five, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JAN 17 1936 the opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 8962 Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1935

William H. Ashelford, Herman Ashelford and Walter Ashelford, co-partners doing business under the name and style of Byron Sand and Stone Company,
Appellee

Appeal from the Circuit Court of Ogle County.

vs.

Illinois Northern Utilities Company, a corporation,
Appellant.

DOVE, J:

The evidence in this case discloses that the plaintiffs are a partnership, doing business as the Byron Sand and Stone Company and that they owned a sand and gravel pit which they had equipped at great expense with machinery and appliances to be run by electricity, and the defendant is a public utility engaged in selling electric current and is the only source from which the plaintiffs could obtain the electric power necessary to successfully operate their business.

It further appears from the evidence that on February 21st, 1928, the parties entered into a written contract by the terms of which the defendant agreed to furnish the plaintiff at the then legal rates such electrical energy as the plaintiff might require. This contract contained the following provisions, viz: "The obligation of both parties hereunder shall commence on the date when the company begins to supply electricity hereunder (such date to be about March 15th, 1928) and shall continue for a fixed term of five years, and after the expiration of such fixed time until 30 days after the receipt by either party of written notice to discontinue service."

Gen. No. 8982 Agenda No. 3

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1925

William H. Ashelford, Herman
Ashelford and Walter Ashelford,
co-partners doing business under
the name and style of Lyon Sand
and Stone Company,
Appellee

vs.

Illinois Northern Utilities Company,
a corporation,
Appellant.

Appeal from the Circuit
Court of Ogle County.

DOYLE, J:

The evidence in this case discloses that the plaintiffs are a partnership, doing business as the Lyon Sand and Stone Company and that they owned a sand and gravel pit which they had equipped at great expense with machinery and appliances to be run by electricity, and the defendant is a public utility engaged in selling electric current and is the only source from which the plaintiffs could obtain the electric power necessary to successfully operate their business.

It further appears from the evidence that on February 21st, 1922, the parties entered into a written contract by the terms of which the defendant agreed to furnish the plaintiffs at the then legal rates such electrical energy as the plaintiffs might require. This contract contained the following provisions, viz: "The obligation of both parties hereunder shall commence on the date when the company begins to supply electricity hereunder (such date to be about March 15th, 1922) and shall continue for a fixed term of five years, and after the expiration of such fixed time until [illegible] after the receipt by either party of written notice to discontinue service."

And it was stipulated upon the hearing of this case that the defendant began to supply electricity on April 30, 1928. The contract further provided that as soon as practical after the end of each month the defendant would render a bill to the plaintiffs for the amount due for such month and the plaintiffs agreed to pay same within ten days thereafter. It was also provided in the contract that "A 'month' under this contract shall mean the period between any two consecutive regular readings by the Company of the meters at the premises, such readings to be taken as nearly as may be practicable, every thirty days." Under the head of "Minimum Charge" the contract contained this provision, viz: "Notwithstanding anything to the contrary hereinbefore contained, the customer agrees to pay for each month's service hereunder, a minimum of 50 cents per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, provided, that at the customer's option and upon his signing the statement printed below, the customer shall pay a yearly minimum charge of $8.00 per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, and in such case, if at the end of any year of the contract term it appears that the total payments hereunder for the year shall not have amounted to the total minimum charge for the year, the customer shall, upon bill rendered, promptly pay the difference." The "Statement Printed Below" reads: "The customer hereby elects to pay a yearly minimum charge as hereinbefore specified instead of a monthly minimum charge." This was signed by the plaintiffs. The provision for terminating the contract for violation of its provisions is as follows, viz: "If the customer shall fail to comply with or perform any of the conditions or obligations hereof on the customers part to be complied with or performed, and after such failure the company shall deliver at said premises, addressed to the customer, a written notice of its intention to cut off

And it was stipulated upon the hearing of this case that the defendant began to supply electricity on April 30, 1928. The contract further provided that as soon as practical after the end of each month the defendant would render a bill to the plaintiffs for the amount due for such month and the plaintiffs agreed to pay same within ten days thereafter. It was also provided in the contract that "A 'month' under this contract shall mean the period between any two consecutive regular readings by the Company of the meters at the premises, such readings to be taken as nearly as may be practicable, every thirty days." Under the head of "Minimum Charge" the contract contained this provision, viz: "Notwithstanding anything to the contrary hereinbefore contained, the customer agrees to pay for each month's service hereunder, a minimum of 50 cents per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, provided, that at the customer's option and upon his signing the statement printed below, the customer shall pay a yearly minimum charge of $8.00 per horse power, or fraction thereof, of the total rated capacity of the motor or motors or other apparatus connected, and in such case, if at the end of any year of the contract term it appears that the total payments hereunder for the year shall not have amounted to the total minimum charge for the year, the customer shall, upon bill rendered, promptly pay the difference." The "Statement Printed Below" reads: "The customer hereby elects to pay a yearly minimum charge as hereinbefore specified instead of a monthly minimum charge." This was signed by the plaintiffs. The provision for terminating the contract for violation of its provisions is as follows, viz: "If the customer shall fail to comply with or perform any of the conditions or obligations hereof on the customers part to be complied with or performed, and after such failure the company shall deliver at said premises, addressed to the customer, a written notice of its intention to cut off

the supply of electricity on account of such failure, then the company shall have the right to cut off the supply at the expiration of five days after the giving of said notice (such 5 days being deemed 'due notice' for the purposes hereof) unless within such five days the customer shall make good such failure. Cutting off the supply of electricity for any such cause shall terminate this contract."

The evidence further discloses that under the date of October 16th, 1928 one of the plaintiffs wrote the defendant: "Please be advised from this date that we are going to shut down our washing and screening plant, and have no further use of electricity, or electrical energy. Please send me bill for Oct. up to this time and I will send you check for same." To which the defendant replied on Oct. 19th, 1928: "Your communication of October 16th has come to me by reference. You are privileged to shut down your plant and will, of course, not have to pay any bill for such months as your plant is down. You have guaranteed a yearly minimum of $1632.00. In view of the fact that you received your first bill June 1, 1928, you have until June 1, 1929 to use up the $1632.00 worth of current. On that date, if you have not used this amount of current, you will be billed for the difference between $1632.00 and the amount you have paid. (Both parties agree this figure should be $1600.00). From a study of your contract you will find it is a five year agreement so that if you wish to discontinue service now, your minimum bills for the entire five years minus what cash you have paid us, will become immediately due and payable and it is only on the payment of such sum that we would discontinue your service. If your plant is not operated for the few winter months you will have no bills, except for the minimum proposition as explained above, which becomes due next June."

It further appears from the evidence that the minimum yearly charge had been increased from $1600.00 to $1800.00 by reason of attaching another motor prior to the year beginning in 1931. On

the supply of electricity on account of such failure, then the company shall have the right to cut off the supply at the expiration of five days after the giving of said notice (such 5 days being deemed 'due notice' for the purposes hereof) unless within such five days the customer shall make good such failure. Cutting off the supply of electricity for any such cause shall terminate this contract."

The evidence further discloses that under the date of October 16th, 1928 one of the plaintiffs wrote the defendant: "Please be advised from this date that we are going to shut down our washing and screening plant, and have no further use of electricity, or electrical energy. Please send me bill for Oct. up to this time and I will send you check for same." To which the defendant replied on Oct. 19th, 1928: "Your communication of October 16th has come to me by reference. You are privileged to shut down your plant and will, of course, not have to pay any bill for such months as your plant is down. You have guaranteed a yearly minimum of $1632.00. In view of the fact that you received your first bill June 1, 1928, you have until June 1, 1929 to use up the $1632.00 worth of current. On that date, if you have not used this amount of current, you will be billed for the difference between $1632.00 and the amount you have paid. (Both parties agree this figure should be $1600.00). From a study of your contract you will find it is a five year agreement so that if you wish to discontinue service now, your minimum bills for the entire five years minus what cash you have paid us, will become immediately due and payable and it is only on the payment of such sum that we could discontinue your service. If your plant is not operated for the few winter months you will have no bills, except for the minimum proposition as explained above, which becomes due next June."

It further appears from the evidence that the minimum yearly charge had been increased from $1600.00 to $1800.00 by reason of attaching another motor prior to the year beginning in 1921. On

February 23, 1932 the defendant sent a statement to the plaintiffs claiming that the plaintiffs were indebted to it on the minimum charge for the years 1931-1932 on 225 horse power at $8.00 per horse power or $1800.00 less a credit of $1173.63, leaving a balance due of $626.37 as of February 23, 1932. The plaintiffs refused to pay this amount and requested the defendant to furnish it with electrical current but the defendant refused and thereafter this suit was instituted by the plaintiffs to recover the damages they sustained by reason of the defendants refusal to furnish the plaintiffs electric service as provided by said written contract. Upon the trial of the case, the jury returned a verdict in favor of the plaintiffs for $10,375.00. The trial court ordered a remittitur of $4,375.00 and this being done, judgment was rendered in favor of the plaintiffs and against the defendant for $6,000.00 and from this judgment the record is brought to this court for review by appeal.

The position of appellees in the lower court and in this court is that the contract does not provide for a monthly minimum or a yearly minimum charge but that it is a five year contract; that by the cumulative payments made by the customer they had paid the minimum on the first four years and that when the company sent them the statements of February 23, 1932, March 23, 1932, and May 5, 1932, the customer did not owe anything for the minimum because he had already paid almost enough to pay the entire five years. In our opinion this position finds a reasonable basis in the company's letter of October 19, 1928, which told the appellee: "From a study of your contract you will find it is a five year agreement so that if you wish to discontinue service now your minimum bills for the entire five years minus what cash you have paid us, will become immediately due and payable and it is only on the payment of such sum that we would discontinue your service."

Upon the hearing it was stipulated that the monthly statements rendered by the Northern Utilities Company to plaintiffs after April

February 25, 1932 the defendant sent a statement to the plaintiffs claiming that the plaintiffs were indebted to it on the minimum charge for the years 1931-1932 on 325 horse power at $8.00 per horse power or $1800.00 less a credit of $1173.63, leaving a balance due of $626.37 as of February 25, 1932. The plaintiffs refused to pay this amount and requested the defendant to furnish it with electrical current but the defendant refused and thereafter this suit was instituted by the plaintiffs to recover the damages they sustained by reason of the defendants refusal to furnish the plaintiffs electric service as provided by said written contract. Upon the trial of the case, the jury returned a verdict in favor of the plaintiffs for $10,875.00. The trial court ordered a remittitur of $4,875.00 and this being done, judgment was rendered in favor of the plaintiffs and against the defendant for $6,000.00 and from this judgment the record is brought to this court for review by appeal.

The position of appellees in the lower court and in this court is that the contract does not provide for a monthly minimum or a yearly minimum charge but that it is a five year contract; that by the cumulative payments made by the customer they had paid the minimum on the first four years and that when the company sent them the statements of February 25, 1932, March 25, 1932, and May 3, 1932, the customer did not owe anything for the minimum because he had already paid almost enough to pay the entire five years. In our opinion this position finds no reasonable basis in the company's letter of October 19, 1926, which told the appellee: "Upon a study of your contract you will find it is a five year agreement so that if you wish to discontinue service now your minimum bills for the entire five years minus what each year has paid, will become immediately due and payable and it is only on the payment of such sum that we would discontinue your service."

Upon the hearing it was stipulated that the monthly statements rendered by the Northern Utilities Company to plaintiffs after April

30, 1928 to and including bill rendered August 4, 1931, November 1, 1931 and November 12, 1931, amounted to $8030.64, and were all paid by plaintiff, and that the only bills paid by plaintiffs after April 30, 1931 were as follows: August 4, 1931 - $555.89, November 1, 1931, - $425.21, November 12, 1931, - $122.53, making a total of $1,173.63.

It is common knowledge, and the record shows that it was understood by both parties, that the plant could not operate with any degree of success during the winter months, and when the plaintiffs notified defendant on October 16th, 1928 that the plant was going to be shut down, and asked for the bill to that date, defendant advised the plaintiffs in their letter of the 19th of the same month that the contract provided for a yearly minimum of $1632.00, but since the first bill was received by plaintiff June 1, 1928 he would have until June 1, 1929 to use up the $1632.00 worth of current, and if on that date he had not used that amount of current he would be billed for the difference between $1632.00 and the amount he had then paid. This could only mean that the next yearly period would begin June 1, 1929 and that each subsequent yearly period would begin on June 1st, unless the time of beginning should be changed. Such being the case, and no change having been made, the fourth yearly period began June 1st, 1931 and ended June 1, 1932 and the bill for $626.37 was prematurely rendered February 23rd, March 23rd and May 5th, 1932. The plaintiffs were not at those times in default and it was therefore the duty of the defendant under its contract to turn on the electricity when notified so to do and it is conceded that such notice was given in writing on May 9, 1932.

For its failure to perform that duty the plaintiffs were entitled to recover such damages as resulted therefrom, and the judgment was justified under the evidence as found in this record.

We are not unmindful of the claim, made by appellant, that W. D. Hart, who wrote the letter of October 19th, 1928, had no authority to bind the defendant by making or consenting to any change in the

30, 1928 to and including bill rendered August 4, 1931, November 1, 1931 and November 12, 1931, amounted to $8038.34, and were all paid by plaintiff, and that the only bills paid by plaintiffs after April 30, 1931 were as follows: August 4, 1931 - $353.82, November 1, 1931, - $425.21, November 12, 1931, - $122.55, making a total of $1,173.83.

It is common knowledge, and the record shows that it was understood by both parties, that the plant could not operate with any degree of success during the winter months, and when the plaintiffs notified defendant on October 15th, 1928 that the plant was going to be shut down, and asked for the bill to that date, defendant advised the plaintiffs in their letter of the 15th of the same month that the contract provides for a yearly minimum of $1838.00, but since the first bill was received by plaintiff June 1, 1929 he would have until June 1, 1929 to use up the $1838.00 worth of current, and if on that date he had not used that amount of current he would be billed for the difference between $1838.00 and the amount he had then paid. This could only mean that the next yearly period would begin June 1, 1929 and that each subsequent yearly period would begin on June 1st, unless the time of beginning should be changed. Such being the case, and no change having been made, the first yearly period began June 1st, 1928 and ended June 1, 1929 and the bill for $839.37 was properly rendered February 4th, March 22nd and May 5th, 1929. The plaintiffs were not at those times in default and it was therefore the duty of the defendant under its contract to turn on the electricity when notified so to do and it is conceded that such notice was given in writing on May 9, 1929.

For its failure to perform that duty the plaintiffs were entitled to recover such damages as resulted thereto, and the judgment was justified under the evidence as found in the record.

We are not unmindful of the claim, made by [illegible], that D. Hart, who wrote the letter of October 15th, 1928, had no authority to bind the defendant by making or assenting to any change in the

contract nor to interpret it as "A five year agreement" and fix the beginning of the first year as of June 1st, 1928. This letter was signed: "W. D. Hart General Contract Agent" and he is the same individual who signed the contract which forms the basis of this suit. That contract is signed "Illinois Northern Utilities Company by W. D. Hart" and the clause of that contract just above the signature reads: "This contract, although signed, is subject to the approval of the General Contract Agent of the Company, and shall not be binding upon the Company until endorsed with his approval." And it is endorsed: "Approved 2/21/1928 Illinois Northern Utilities Co. by: W. D. Hart General Contract Agent."

The appellant company adopted the contract and there can be no doubt that so far as it is concerned W. D. Hart had full authority to do anything the Company could have done in connection with it at the time it was executed or at any time thereafter while it was still executory.

We think the amount of the judgment is clearly within the scope of the evidence as to the amount of damages which appellees sustained and finding no substantial error in the record, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

contract nor to interpret it as a five year agreement" and fix the beginning of the first year as of June 1st, 1929. This letter was signed: "W. D. Hart General Contract Agent" and he is the same individual who signed the contract which forms the basis of this suit. That contract is signed "Illinois Northern Utilities Company by W. D. Hart" and the clause of that contract just above the signature reads: "This contract, although signed, is subject to the approval of the General Contract Agent of the Company, and shall not be binding upon the Company until endorsed with his approval." And it is endorsed: "Approved 2/21/1929 Illinois Northern Utilities Co. by: W. D. Hart General Contract Agent."

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We think the amount of the judgment is clearly within the scope of the evidence as to the amount of damages which appellees sustained and finding no substantial error in the record, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. IESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 24 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 9015 Agenda No. 2

In the Appellate Court of Illinois

Second District

February Term, A. D. 1936.

Alta C. Thompson,

Appellant,

vs.

B. A. Knight,

Appellee,

Appeal from the Circuit Court of Winnebago County

DOVE, J.

This action was commenced January 22, 1932. The original declaration consisted of the common counts to which an affidavit of the plaintiff was attached disclosing that the demand of the plaintiff was for principal and interest due on a note and trust deed, the payment of which was guaranteed by the defendant, and that the amount due the plaintiff was $2962.00. Subsequently an additional count was filed, which alleged, among other things, that the defendant is an attorney at law engaged in the general practice of his profession at Rockford, and that on or about October 18, 1930 the plaintiff was a client of the defendant and that such relationship existed at and prior to October 18, 1930 and continued up to and subsequent to March 26, 1931. That prior to October 18, 1930 the plaintiff had accumulated for investment purposes the sum of $3,000.00 and about that time she consulted with the defendant and sought his advice with reference to investing such sum and the defendant thereupon promised the plaintiff that he would investigate certain investments and advise her in connection with the investment of her money. The additional count then charged that the defendant was personally interested in the sale of certain subdivided and vacant lots known as "Revell's Blackhawk Island" and that he, knowing the plaintiff had $3,000.00 to

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Appellant,

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invest and knowing that, as her attorney, he could advise her in reference to said investments and obtain the money from her, entered into a contract with Rolahd King and Frances King, to whom he, the defendant, executed a deed to certain lots on "Revell's Blackhawk Island", that on or about August 20, 1930 the defendant advised the plaintiff that he had obtained a good and safe mortgage which was a good investment and was capable of yielding a good return, which he, as her attorney, would advise her to purchase, that the plaintiff delivered $3,000.00 to the defendant on or about August 20, 1930 and accepted from him a note and trust deed executed by the said Roland and Frances King. The additional count then charges that at this time the defendant represented to the plaintiff that the premises covered by the trust deed were worth at least $9,000.00, that he, the defendant, was personally acquainted with Roland King and wife, that they were fine and respectable people and that the mortgage was well worth the money. It is then averred that the plaintiff relied upon the said statements of the defendant and believed in his integrity and honesty, and did not know that he personally had any interest in the premises covered by said trust deed, and that she had no reason to believe that any of the representations made by the defendant were false or untrue. The additional count further alleged that the said Roland King and wife never paid any interest on said mortgage and that the money which the plaintiff paid to the defendant was retained by the defendant, who used such sum for the payment of his personal indebtedness for the purchase price of the premises covered by said trust deed and for the payment of a certain mechanic's lien then existing against said premises, and that the said Roland King and wife never at any time received any cash consideration on account of said transaction. It was further averred that on or about March 26, 1931 tha plaintiff ascertained the facts in connection with said loan and that she thereupon called upon

invest and knowing that, as her attorney, he could advise her in reference to said investments and obtain the money from her, entered into a contract with Roland King and Frances King, to whom he, the defendant, executed a deed to certain lots on "Devell's Blackhawk Island"; that on or about August 20, 1930 the defendant advised the plaintiff that he had obtained a good and safe mortgage which was a good investment and was capable of yielding a good return, which he, as her attorney, would advise her to purchase; that the plaintiff delivered $3,000.00 to the defendant on or about August 20, 1930 and accepted from him a note and trust deed executed by the said Roland and Frances King. The additional count then charges that at this time the defendant represented to the plaintiff that the premises covered by the trust deed were worth at least $9,000.00, that he, the defendant, was personally acquainted with Roland King and wife, that they were fine and respectable people and that the mortgage was well worth the money. It is then averred that the plaintiff relied upon the said statements of the defendant and believed in his integrity and honesty, and did not know that he personally had any interest in the note covered by said trust deed, and that she had no reason to believe that any of the representations made by the defendant were false or untrue. The additional count further alleged that the said Roland King and wife never paid any interest on said mortgage and that the money which the plaintiff paid to the defendant was retained by the defendant, who used such sum for the payment of his personal indebtedness for the purchase price of the premises covered by said trust deed and for the payment of a certain mechanic's lien then existing against said premises, and that the said Roland King and wife never at any time received any cash consideration on account of said transaction. It was further averred that on or about March 20, 1931 the plaintiff ascertained the facts in connection with said loan and that the interest called upon

the defendant, who was then acting as her attorney, and advised him of the situation, and the defendant thereupon, in consideration of the plaintiff not taking any action against him and in consideration of her extending the time of the payment and interest thereon, then and there promised to pay the plaintiff said $3,000.00, together with all interest thereon, and as evidence of such promise, the defendant executed and delivered to the plaintiff the following instrument, viz: "Rockford, Illinois. March 26, 1931. Mrs. Alta C. Thompson. Dear Madam: Heretofore at my suggestion you placed a loan of $3,000.00 with Mr. and Mrs. Roland King upon a first mortgage on lots in Collins Island and four lots in Revell's Blackhawk Island. I furnished you an abstract for the lots in Collins Island, but as to the abstract of the four lots in Revell's Blackhawk Island it was my plan then, and now is, to furnish four printed abstracts to be made from the original abstract which I have on hand. Now, you are desirous of knowing what final disposition will be made of said mortgage. This is to report to you that yesterday I gave an option of my one-half of the land called the Rood lot, in the City of Rockford, payment on said option to be closed thirty days from date. This is to assure you that upon the closing of said sale, I will take up mortgage at par, plus interest at par. In case said sale does not materialize, then will sell for you said mortgage, principal and interest. Within sixty days I will take said mortgage off from your hands at par, principal and interest. B. A. Knight". On the back of this instrument appears the following, viz: "Tuesday, April 14, 1931, B. A. Knight paid on this contract $250.00. Saturday, April 18, 1931, B. A. Knight paid on this contract $250.00". The additional count then alleged that the plaintiff had confidence in the defendant, relied upon and believed his representations and that although she demanded that he carry his agreement out, he refused to do to, although he made payments of $250.00 each on April 14, 1931

the defendant, who was then acting as her attorney, and advised him of the situation, and the defendant thereupon, in consideration of the plaintiff not taking any action against him and in consideration of her extending the time of the payment and interest thereon, then and there promised to pay the plaintiff said $3,000.00, together with all interest thereon, and as evidence of such promise, the defendant executed and delivered to the plaintiff the following instrument, viz:

"Rockford, Illinois. March 26, 1931. Mrs. Alta G. Thompson.

Dear Madam: Heretofore at my suggestion you placed a loan of $3,000.00 with Mr. and Mrs. Roland King upon a first mortgage on lots in Collins Island and four lots in Revell's Blackhawk Island. I furnished you an abstract for the lots in Collins Island, but as to the abstract of the four lots in Revell's Blackhawk Island it was my plan then, and now is, to furnish four printed abstracts to be made from the original abstract which I have on hand. Now, you are desirous of knowing what final disposition will be made of said mortgage. This is to report to you that yesterday I gave an option of my one-half of the land called the Ford lot, in the City of Rockford, payment on said option to be closed thirty days from date. This is to assure you that upon the closing of said sale, I will take up mortgage at par, plus interest at par. In case said sale does not materialize, then will sell for you said mortgage, principal and interest. Within sixty days I will take said mortgage off from your hands at par, principal and interest. B. A. Knight". On the back of this instrument appears the following, viz: "Tuesday, April 14, 1931, B. A. Knight paid on this contract $250.00. Saturday, April 18, 1931, B. A. Knight paid on this contract $250.00". The additional count then alleged that the plaintiff had confidence in the defendant, relied upon and believed his representations and that although she demanded that he carry his agreement out, he refused to do so, although he made payments of $250.00 each on April 14, 1931

and April 18, 1931 to the plaintiff. It was then averred that the said Roland King and Frances King, shortly after the execution of said note and mortgage, abandoned the mortgaged premises and suddenly departed for parts unknown; that the premises covered by said mortgage are practically worthless and that no money can be collected therefrom, and that the plaintiff is willing to return and assign said note and mortgage to the defendant upon his payment to her of the amount due.

Upon the motion of the defendant, a bill of particulars was furnished. Thereafter the defendant filed a plea or answer in which, among other things, he admitted the execution of the instrument dated March 26, 1931, stating that he did so "in order to compromise the situation without incurring any liability thereby". After the issues had been made up, the cause was submitted to a jury for determination. At the conslusion of the evidence offered on behalf of the plaintiffs, the jury, in obedience to the court's peremptory instruction, returned a verdict in favor of the defendant, upon which judgment was rendered and the record is in this court for review by appeal.

The evidence discloses that appellee is a practicing lawyer in the City of Rockford and has been for many years. That appellant became his client in 1924 and since that time appellee has been her legal adviser in several matters. In April, 1930, appellee prepared appellant's will and on April 10, 1930 she paid him $25.00 and he executed and delivered to her a receipt for that amount, the receipt stating that it was in full of her account to that date. The evidence further discloses that in the month of August 1930, appellant was again in appellee's office, seeking his advice concerning some money which was at that timedue her, and upon this occasion she inquired of appellee if he ever made loans and was assured by appellee that he frequently did make loans for his clients. She then inquired of him whether he could place her money on a good loan,

and April 18, 1931 to the plaintiff. It was then averred that the said Roland King and Frances King, shortly after the execution of said note and mortgage, abandoned the mortgaged premises and suddenly departed for parts unknown; that the premises covered by said mortgage are practically worthless and that no money can be collected therefrom, and that the plaintiff is willing to return and assign said note and mortgage to the defendant upon his payment to her of the amount due.

Upon the motion of the defendant, a bill of particulars was furnished. Thereafter the defendant filed a plea or answer in which, among other things, he admitted the execution of the instrument dated March 26, 1931, stating that he did so "in order to compromise the situation without incurring any liability thereby". After the issues had been made up, the cause was submitted to a jury for determination. At the conclusion of the evidence offered on behalf of the plaintiffs, the jury, in obedience to the court's peremptory instruction, returned a verdict in favor of the defendant, upon which judgment was rendered and the record is in this court for review by appeal.

The evidence discloses that appellee is a practicing lawyer in the City of Rockford and has been for many years. That appellant became his client in 1924 and since that time appellee has been her legal adviser in several matters. In April, 1930, appellee prepared appellant's will and on April 10, 1930 she paid him $38.00 and he executed and delivered to her a receipt for that amount, the receipt stating that it was in full of her account to that date. The evidence further discloses that in the month of August 1930, appellant was again in appellee's office, seeking his advice concerning some money which was at that time due her, and upon this occasion she inquired of appellee if he ever made loans and was assured by appellee that he frequently did make loans for his clients. The then inquired of him whether he could place her money on a good loan,

and he replied that first class loans were the only kind he ever made for his clients. Appellee then inquired of appellant how much she desired him to loan for her and she told him that the amount was $3,000.00. After some further conversation, she requested appellee to look around and ascertain whether he could find her a good loan. It further appears from the evidence that thereafter appellee called at her home, which is on a farm some fifteen miles from Rockford, but she was not at home and the following morning, which was August 18, 1930, she, at his request, came to his office in Rockford and at that time she delivered to him two drafts aggregating $3,000.00 andreceived from him a note executed by Roland King and wife for the principal sum of $3,000100 bearing 6% interest payable semi-anhually. It further appears from the evidence that at this time appellee told appellant that the loan was a splendid one, that appellant had nothing to fear, as it was as good a loan as appellant had ever made, that the makers of the trust deed were good, substantial people and that the trust deed covered a wonderful piece of property improved by a hice bungalow and that it was located on a nice piece of ground and that the trust deed covered four other lots. Appellant further testified that appellee stated that he would keep the trust deed and have it put on record. That she later received an abstract for the improved lot and also later received the trust deed after it had been recorded. She further testified that at the time she delivered tp appellee the $3,000.00 she had never seen the property described in the trust deed, and that the first time she did see it was in October 1930 when she went there accompanied by appellee. It was at this time that she ascertained that the four vacant lots were on an island called Blackhawk Island in the Rock River, which could only be reached by a row boat and that the four vacant lots faced the river and were perhaps fifty feet wide, practically unimproved. Appellant further testified that the other property covered by the trust deed was called Collins Island and instead of being improved by a beautiful bungalow as

and he replied that first class loans were the only kind he ever made for his clients. Appellee then inquired of appellant how much she desired him to loan for her and she told him that the amount was $3,000.00. After some further conversation, she requested appellee to look around and ascertain whether he could find her a good loan. It further appears from the evidence that thereafter appellee called at her home, which is on a farm some fifteen miles from Rockford, but she was not at home and the following morning, which was August 18, 1930, she, at his request, came to his office in Rockford and at that time she delivered to him two drafts aggregating $2,000.00 and received from him a note executed by Roland King and wife for the principal sum of $3,000.00 bearing 6% interest payable semi-annually. It further appears from the evidence that at this time appellee told appellant that the loan was a splendid one, that appellant had nothing to fear, as it was as good a loan as appellant had ever made, that the makers of the trust deed were good, substantial people and that the trust deed covered a wonderful piece of property improved by a nice bungalow and that it was located on a nice piece of ground and that the trust deed covered four other lots. Appellant further testified that appellee stated that he would keep the trust deed and have it put on record. That she later received an abstract for the improved lot and also later received the trust deed after it had been recorded. She further testified that at the time she delivered to appellee the $3,000.00 she had never seen the property described in the trust deed, and that the first time she did see it was in October 1930 when she went there accompanied by appellee. It was at this time that she ascertained that the four vacant lots were on an island called Black-hawk Island in the Rock River, which could only be reached by a row boat and that the four vacant lots faced the river and were perhaps fifty feet wide, practically unimproved. Appellant further testified that the other property covered by the trust deed was called Collins Island and instead of being improved by a beautiful bungalow as

appellee had previously described it to her, she learned for the first time in October, 1930 that it was improved by an inexpensive summer cottage containing aliving room, two small bedrooms, a small kitchen and basement. That the building was frame, with paper roofing, had no plaster and no plumbing, but an outside toilet, a poultry house and some rabbit hutches. Appellant further testified that upon this occasion she told appellee that she was very much dissatisfied with the loan and reminded him of his assurances when the loan was negotiated and told him then that he had never told her that she would have to get a row boat in order to get to the cottage. She further testified that appellee replied that the property was well worth three times the amount she had loaned and that she need not worry as the people who made the trust deed would pay the interest and principal promptly, that there was going to be a waterway through there some day and it would all be dredged out and made much more valuable. Appellant further testified that on March 26, 1931 she went to appellee's office, accompanied by her husband and again told appellee that she was dissatisfied with the loan, that no interest had been paid and told him that he had misrepresented the entire transaction and that something must be done, and that if he didn't make the loan good, she would bring suit against him. Appellant further testified that it was upon this occasion that the instrument set forth in the additional count dated March 26, 1931 was executed by appellee and delivered to her. That thereafter and on April 14, 1931, she again called upon appellee and it was at this time that he paid her $250.00 and the notation was made upon the instrument as indicated. That on April 18, 1931 she again called upon appellee and he again paid her $250.00 and a like notation was at that time made upon the instrument. Upon this occasion appellee testified that she told appellant she was in great need of money and asked him when he would be able to pay her the rest of it and he stated to her that he was going to pay it off just as quickly as he

appellee had previously described it to her, she learned for the first time in October, 1930 that it was improved by an inexpensive summer cottage containing living room, two small bedrooms, a small kitchen and basement. That the building was frame, with paper roofing, had no plaster and no plumbing, but an outside toilet, a poultry house and some rabbit hutches. Appellant further testified that upon this occasion she told appellee that she was very much dissatisfied with the loan and reminded him of his assurances when the loan was negotiated and told him then that he had never told her that she would have to get a row boat in order to get to the cottage. She further testified that appellee realized that the property was well worth three times the amount she had loaned and that she need not worry as the people who made the trust deed would pay the interest and principal promptly, but there was going to be a waterway through there some day and it would all be dredged out and made much more valuable. Appellant further testified that on March 26, 1931 she went to appellee's office, accompanied by her husband and again told appellee that she was dissatisfied with the loan, that no interest had been paid and told him that he had misrepresented the entire transaction and that something must be done, and that if he didn't make the loan good, she would bring suit against him. Appellant further testified that it was upon this occasion that the instrument set forth in the additional count dated March 26, 1931 was executed by appellee and delivered to her. That thereafter and on April 16, 1931, she again called upon appellee and it was at this time that he paid her $250.00 and the notation was made upon the instrument as indicated. That on April 16, 1931 she again called upon appellee and he again paid her $250.00 and a like notation was at that time made upon the instrument. Upon this occasion she also testified that she told appellant she was in great need of money and asked him when he would be able to pay her the rest of it and he

could. It further appears from the evidence that on May 9, 1931 appellee wrote appellant, advising her that the papers for one of the matters which he expected to be closed were signed on that day and he would be able to send her some more money the early part of the week.

Appellant called appellee as a witness and he testified that in August 1930 he held a mortgage upon the four lots on Blackhawk Island covered by the trust deed as Mr. Revell had purchased them, with other lots, from him and had executed to him a mortgage thereon. That on August 18, 1930 he received $3,000.00 from appellant and applied $2,000.00 of that on the mortgage that he held which had been executed by Mr. Revell. The evidence further disclosed that the Collins Island bungalow was a one story cottage, having a value in 1930 of $1300.00 or $1400.00 and that the four lots on Blackhawk Island had an actual cash value of between $200.00 and $225.00 per lot in 1930.

It is first insisted by counsel for appellee that this court should affirm the judgment of the trial court because counsel for appellant failed to observe the requirement of Rule Nine of this court which provides that the brief of appellant shall contain a short and clear statement of the case, together with the errors relied upon for reversal. An examination of the record discloses that counsel for appellant followed the former practice and attached thereto an assignment of errors and this assignment is included in the abstract. Furthermore, at the conclusion of appellant's brief on page fourteen thereof, counsel for appellant specifically enumerate the errors relied upon for reversal and insist that the judgment appealed from should be reversed, first, because the trial court sustained appellee's objection to exhibit thirteen (being the instrument hereinbefore referred to which is dated March 26, 1931); second, that the trial court erred in adopting the view that appellee's promise to repay, as evidenced by said exhibit, was conditional and without consideration; and third, that it was error for the trial court to direct a verdict in

could. It further appears from the evidence that on May 9, 1931 appellee wrote appellant, advising her that the papers for one of the matters which he expected to be closed were signed on that day and he would be able to send her some more money the early part of the week.

Appellant called appellee as a witness and he testified that in August 1930 he held a mortgage upon the four lots on Jackhawk Island covered by the trust deed as Mr. Revell had purchased them, with other lots, from him and had executed to him a mortgage thereon. That on August 18, 1930 he received $3,000.00 from appellant and applied $2,000.00 of that on the mortgage that he held which had been executed by Mr. Revell. The evidence further disclosed that the Collins Island bungalow was a one story cottage, having a value in 1930 of $1800.00 or $1400.00 and that the four lots on Jackhawk Island had an actual cash value of between $400.00 and $850.00 per lot in 1930.

It is first insisted by counsel for appellee that this court should affirm the judgment of the trial court because counsel for appellant failed to observe the requirement of Rule Nine of this court which provides that the brief of appellant shall contain a short and clear statement of the case, together with the errors relied upon for reversal. In examination of the record discloses that counsel for appellant followed the former practice and attached thereto an assignment of errors. No this assignment is included in the abstract. Further more, at the conclusion of appellant's brief on the fourteen thereof, counsel for appellant specifically enumerate the errors relied upon for reversal and insist that the judgment appealed from should be reversed, first, because the trial court sustained appellee's objection to our bill filed being the instrument hereinbefore referred to which is dated March 20, 1931); second, that the trial court erred in adopting the view that appellee's counsel to remay, as evidenced by said exhibit, was conditional and without consideration; and third, that it was error for the trial court to direct a verdict in

favor of appellee. There is no merit in this contention of appellee.

It is next insisted by counsel for appellee that the judgment should be affirmed because counsel for appellant failed to comply with Section 68 of the Practice Act and specify, in writing, in her motion for a new trial the grounds relied upon for the allowance of her motion. Section 68 of the Practice Act does provide that if a party may wish to move for a new trial, he shall before final judgment is entered filed the points in writing, particularly specifying the grounds of such motion. This portion of the present Practice Act is substantially the same as Section 77 of the Practice Act of 1907, which has been held to be directory and not mandatory. Yarber v. Chicago and Alton Ry, Co., 235 Ill. 589. The record in the instant case discloses that the verdict was returned on June 26, 1935 and on that day a motion to set aside the verdict and grant a new trial was entered and on July 2, 1935 the motion was heard and denied. The abstract does not disclose whether this motion was an oral one or written, but an examination of the record does not disclose any written motion, nor does it show that appellee made any request to the trial court that the motion be reduced to writing nor that any objection was interposed by appellee to the form in which it was presented. In this condition of the record, appellant was in a position to avail herself of any cause for a new trial which may appear in the record, whether it be the admission or rejection of evidence or the giving of instructions. The People v. Cohen, 352 Ill. 380. Furthermore, it was not necessary that a motion for a new trial be made in order to have this court determine the correctness of the action of the trial court in giving the instruction complained of. Yarber v. Chicago and Alton Ry. Co., supra.

Counsel for appellee next insist that the evidence discloses that the relationship of attorney and client did not exist between the parties hereto, but does disclose that what appellee did was to

favor of appellee. There is no merit in this contention of appellee.

It is next insisted by counsel for appellee that the judgment should be affirmed because counsel for appellant failed to comply with Section 68 of the Practice Act and specify, in writing, in her motion for a new trial the grounds relied upon for the allowance of her motion. Section 68 of the Practice Act does provide that if a party may wish to move for a new trial, he shall before final judgment is entered file the points in writing, particularly specifying the grounds of such motion. This portion of the present Practice Act is substantially the same as Section 77 of the Practice Act of 1907, which has been held to be directory and not mandatory. Yerkes v. Chicago and Alton Ry. Co., 238 Ill. 382. The record in the instant case discloses that the verdict was returned on June 24, 1938 and on that day a motion to set aside the verdict and grant a new trial was entered and on July 2, 1938 the motion was heard and denied. The abstract does not disclose whether this motion was an oral one or written, but an examination of the record does not disclose any written motion, nor does it show that appellee made any request to the trial court that the motion be reduced to writing nor did any objection was interposed by appellee to the form in which it was presented. In this condition of the record, appellant was in a position to avail herself of any issue for a new trial which may appear in the record, whether it be the admission or rejection of evidence or the giving of instructions. Kemplin v. Kelsey, 326 Ill. 320. Furthermore, it was not necessary that a motion for a new trial be made in order to have this court determine the correctness of the action of the trial court in giving the instruction complained of. Yerkes v. Chicago and Alton Ry. Co., supra.

Counsel for appellee next insist that the evidence discloses that the relationship of attorney and client did not exist between the parties hereto, but does disclose that what occurred did not lead to

bring together a borrower and a lender, that appellant was a woman of exceptional business ability and experience, that she relied upon her own judgment before making the loan in question; that appellee was under no legal duty to take the loan off the hands of appellant, and the mere fact that appellee offered to take up the loan after appellant had had it for several months disclosed a commendable desire on the part of appellee to appease one who suffered financial loss as a result of the depression.

It is unnecessary for us to determine whether the evidence discloses that the relationship of attorney or client existed at the time of the transaction involved herein. The evidence does disclose that such relationship had existed previous to that time and appellant's testimony is to the effect that she was in appellee's office in August 1930 seeking his advice concerning some money which was due her. It was at this time she inquired whether appellee could loan some money for her and after some discussion she requested him to look around and see whether he could find her a good loan. If the relationship of attorney and client did not then exist, appellant constituted appellee her agent for the purpose of procuring a good loan. He thereafter informed her he had procured such a loan. The evidence tends to prove that appellant had not seen the property covered by the trust deed and that appellee knew she had not, and it was but reasonable for him to suppose that she relied upon what he told her. She later went with appellee to see the property covered by the trust deed. Appellant then told appellee that she was very much disappointed, but he assured her that the property was worth at least three times the amount of her loan. After the first semi-annual installment of interest became due and was not paid, appellee, accompanied by her husband, went to appellee's office, and appellant again told appellee that he had misrepresented the security and that she would bring suit against him. It was upon this occasion that appellee

bring together a borrower and a lender, that appellant was a woman of exceptional business ability and experience, that she relied upon her own judgment before making the loan in question; that appellee was under no legal duty to take the loan off the hands of appellant, and the mere fact that appellee offered to take up the loan after appellant had had it for several months disclosed a commendable desire on the part of appellee to appease one who suffered financial loss as a result of the depression.

It is unnecessary for us to determine whether the evidence discloses that the relationship of attorney or client existed at the time of the transaction involved herein. The evidence does disclose that such relationship had existed previous to that time and appellant's testimony is to the effect that she was in appellee's office in August 1930 seeking his advice concerning some money which was due her. It was at this time she inquired whether appellee could loan some money for her and after some discussion she requested him to look around and see whether he could find her a good loan. If the relationship of attorney and client did not then exist, appellant constituted appellee her agent for the purpose of procuring a good loan. He thereafter informed her he had procured such a loan. The evidence tends to prove that appellant had not seen the property covered by the trust deed and that appellee knew she had not, and it was but reasonable for him to suppose that she relied upon what he told her. She later went with appellee to see the property covered by the trust deed. Appellant then told appellee that she was very much disappointed, but he assured her that the property was worth at least three times the amount of her loan. After the first semi-annual installment of interest became due and was not paid, appellee, accompanied by her husband, went to appellee's office, and appellant again told appellee that he had misrepresented the security and that she would bring suit against him. It was upon this occasion that appellee

executed the instrument which he delivered to appellant and which stated that he had given a thirty day option on what he called the Rood lot and that upon the sale being closed, he obligated himself to take up the King mortgage at par plus interest and in the event the sale of the Rood lot did not materialize, then he would sell for appellee said King mortgage at par, principal and interest, and that in any event he would within sixty days from March 26, 1931 take said mortgage from appellant at par, principal and interest. That appellee recognized this as a binding agreement is evidenced by the fact that on April 14, 1931 he paid appellant $250.00 and four days later he paid her another $250.00. Thereafter, on May 9, 1931, he wrote her to the effect that he could send her some more money the early part of the following week.

In our opinion, all this evidence tends to prove the allegations of appellant's additional count and that the instruments executed by appellee and delivered to appellant, dated March 26, 1931 and May 9, 1931 respectively, were competent evidence when taken in connection with all the testimony in the record and the trial court therefore erred in sustaining objections thereto. We are further of the opinion that the promise of appellee to pay appellant the amount of the King mortgage and interest was not conditional, nor was it made without consideration. The evidence tended to prove an unconditional promise by appellee to pay appellant within sixty days after March 26, 1931 the amount due, principal and interest, on the King note and trust deed for those securities. The evidence further tends to prove that the consideration for that promise was appellant's forbearance and promise of forebearance from bringing suit against appellee. This was a sufficient consideration to support such a promise. Automatic Electric Co. v. Campbell, 197 Ill. App. 591. Webbe v. Romona Oolitic Stone Co., 58 Ill. App. 222.

The judgment of the Circuit Court of Winnebago County is reversed and this cause remanded for another trial.

REVERSED AND REMANDED.

executed the instrument which he delivered to appellant and which stated that he had given a thirty day option on what he called the Hood lot and that upon the sale being closed, he obligated himself to take up the King mortgage at par plus interest and in the event the sale of the Hood lot did not materialize, then he would sell for appellee said King mortgage at par, principal and interest, and that in any event he would within sixty days from March 26, 1931 take said mortgage from appellant at par, principal and interest. That appellee recognized this as a binding agreement is evidenced by the fact that on April 14, 1931 he paid appellant $280.00 and four days later he paid her another $280.00. Thereafter, on May 9, 1931, he wrote her to the effect that he could send her some more money the early part of the following week.

In our opinion, all this evidence tends to prove the allegations of appellant's additional count and that the instruments executed by appellee and delivered to appellant, dated March 26, 1931 and May 9, 1931 respectively, were competent evidence when taken in connection with all the testimony in the record and the trial court therefore erred in sustaining objects to thereto. We are further of the opinion that the promise of appellee to pay appellant the amount of the King mortgage and interest was not conditional, nor was it made without consideration. The evidence tended to prove an unconditional promise by appellee to pay appellant within sixty days after March 26, 1931 the amount due, principal and interest, on the King note and trust deed for those securities. The evidence further tends to prove that the consideration for that promise was appellant's forbearance and promise of forbearance from bringing suit against appellee. This was a sufficient consideration to support such a promise. Automatic Electric Co. v. Campbell, 197 Ill. App. 321. Webb v. Romona Portlic Stone Co., 58 Ill. App. 222.

The judgment of the Circuit Court of Winnebago County is reversed and this cause remanded for another trial.

REVERSED AND REMANDED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 24 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 9029 Agenda No. 8

In the Appellate Court of Illinois

Second District

February Term, A. D. 1936

Charles D. Henry, Jr.,

Appellee,

vs.

The Federal Land Bank of

St. Louis, a corporation,

Appellant,

Appeal from the Circuit Court

of Kankakee County

DOVE, J.

On January 23, 1935 this suit was instituted before a Justice of the Peace, resulting in a verdict for the plaintiff for $200.00, upon which judgment was rendered. Upon appeal to the Circuit Court the cause came on for trial before a jury, and during the cross-examination of Mr. Kircher, a witness called on behalf of the defendant, the trial court announced that there was no question of fact for the jury to pass upon and the jury was discharged and the trial proceeded before the court, resulting in a judgment for the plaintiff for $225.00. This further appeal has been prosecuted by the defendant.

The evidence discloses that appellee, the plaintiff below, is a lawyer residing in Kankakee. That on April 4, 1931 appellant, the defenda t below, wrote appellee from its St. Louis office the following letter: "Dear Sir: Re: Loan 8497-A. Rivard. Mr. John Collier, Secy.-Treas. of the Kankakee County National Farm Loan Association, through which the foregoing loan was made has suggested that you might assist as local counsel in the foreclosure of the foregoing loan. I am, therefore, writing to know whether it would be satisfactory with you to have you follow the calendar, file the pleadings, make proof before the Master and prove up the usual attorney fee, while in turn we would prepare all pleading

Gen. No. 9029 Agenda No. 8

In the Appellate Court of Illinois

Second District

February Term, A. D. 1935

Charles D. Henry, Jr.,

Appellee,

vs.

The Federal Land Bank of St. Louis, a corporation,

Appellant,

Appeal from the Circuit Court of Kankakee County

DOVE, J.

On January 25, 1935 this suit was instituted before a Justice of the Peace, resulting in a verdict for the plaintiff for $200.00, upon which judgment was rendered. Upon appeal to the Circuit Court the cause came on for trial before a jury, and during the cross-examination of Mr. Kircher, a witness called on behalf of the defendant, the trial court announced that there was no question of fact for the jury to pass upon and the jury was discharged and the trial proceeded before the court, resulting in a judgment for the plaintiff for $225.00. This further appeal has been prosecuted by the defendant.

The evidence discloses that appellee, the plaintiff below, is a lawyer residing in Kankakee. That on April 4, 1931 appellant, the defendant below, wrote appellee from its St. Louis office the following letter: "Dear Sir: Re: Loan 8407-A. Mizard. Mr. John Collier, Secy.-Treas. of the Kankakee County National Farm Loan Association, through which the foregoing loan was made, has suggested that you might assist as local counsel in the foreclosure of the foregoing loan. I am, therefore, writing to know whether it would be satisfactory with you to have you follow the calendar, file the pleadings, make proof before the Master and prove up the usual attorney fee, while in turn we would prepare all pleading

here. For your services we would expect to pay a nominal amount of $50.00 and whatever actual fee could be thereafter realized from the foreclosure of the farm, that is, to the extent of the collection of any fee, the entire amount would be remitted to you. Also the nominal amount is fixed on the presumption that there will be no contest. Please let me know whether such or a similar arrangement will be satisfactory, and if so, will you please examine the files in the suit of Frank Duchene, Executor, v. Alexis Rivard, Ch. #21450, and let me know the statuts of this foreclosure. It may be that we can ask leave to be made party defendant, file answer and cross bill in that suit rather than file a separate bill foreclosing our mortgage". Appellee accepted employment as outlined in the foregoing letter and during the ensuing two years appeared for and represented appellant in sixteen foreclosure cases and the instant suit is brought to recover $400.00 balance of a $450.00 fee which he claims to be due him for services rendered in a foreclosure proceeding filed by appellant against Louis G. Goodnecht.

The evidence further discloses that the Goodnecht mortgage covered approximately one hundred and eighty acres of land and the suit to foreclose the same was instituted on November 17, 1931, resulting in a decree of foreclosure being rendered on April 20, 1932 which found the mortgage debt to be $9,165.92, which included a solicitor fee of $450.00 for services rendered by appellee and Theo. E. Kircher. Thereafter on May 14, 1932 the premises were sold by the Master to appellant for $7500.00, the Master reporting a deficiency of $1911.68. On August 19, 1933 appellant received a Master's deed to the premises and thereafter on March 26, 1934 appellant conveyed the same premises to Goodnecht for an expressed consideration of $9,601.03.

Theo. E. Kircher testified on behalf of appellant that the amount appellant had invested in this farm at the time it deeded the premises to Goodnecht was $10,578.67, this amount being made

here. For your services we would expect to pay a nominal amount of $50.00 and whatever actual fee could be thereafter realized from the foreclosure of the farm, that is, to the extent of the collection of any fee, the entire amount would be remitted to you. Also the nominal amount is fixed on the presumption that there will be no contest. Please let me know whether such or a similar arrangement will be satisfactory, and if so, will you please examine the files in the suit of Frank Duchene, Executor, v. Alexis Rivard, Ch. #21450, and let me know the status of this foreclosure. It may be that we can ask leave to be made party defendant, file answer and cross bill in that suit rather than file a separate bill foreclosing our mortgage". Appellee accepted employment as outlined in the foregoing letter and during the ensuing two years appeared for and represented appellant in sixteen foreclosure cases and the instant suit is brought to recover $100.00 balance of a $450.00 fee which he claims to be due him for services rendered in a foreclosure proceeding filed by appellant against Louis C. Goodnecht.

The evidence further discloses that the Goodnecht mortgage covered a proximately one hundred and eighty acres of land and the suit to foreclose the same was instituted on November 17, 1931, resulting in a decree of foreclosure being rendered on April 20, 1932 which found the mortgage debt to be $2,165.97, which included a solicitor fee of $450.00 for services rendered by appellee and Theo. E. Kiracofe. Thereafter on May 14, 1932 the premises were sold by the Master to appellant for $7000.00, the Master reporting a deficiency of $1011.58. On August 15, 1932 appellant received a Master's deed to the premises and thereafter on March 24, 1934 appellant conveyed the same premises to Goodnecht for an expressed consideration of $2,001.02.

Theo. E. Kiracofe testified on behalf of appellant that the amount appellant had invested in the farm at the time it deeded the premises to Goodnecht was $10,372.97, this amount being made

up of the following items, viz:

Purchase price, May 14, 1932	$7500.00
Interest thereon to April 1, 1934	881.25
Taxes	57.83
Taxes July 28, 1932	56.95
Interest on taxes to Apr. 1, 1934 @ 6%.....	11.45
Defieiency	1911.68
Interest on deficiency @ 5% to Apr.1,1934	187.12
Taxes paid Apr. 12, 1933	119.86
Interest on these taxes to Apr. 1/34	7.14
Drainage tax paid Nov. 17, 1933	12.36
Total	$10745.64
Credit, rents collected	166.97
	$10578.67

Mr. Kircher further testified that the consideration mentioned in the deed made by appellant to Goodnecht on March 26, 1934 was determined and computed by appellant by taking the principal amount of the Goodnecht loan, before the foreclosure suit was filed and adding thereto insurance premium, taxes, abstract fee, mechanic's lien, filing fee, sheriff fees, Master's fees, $50.00 attorney fee paid to appellee and accrued interest to the date of the decree. These various amounts aggregated $8992.83. That to this amount appellant added interest at the rate of four and one-half per cent to January 15, 1934, amounting to $608.20, and the total of these two items make $9601.03, the amount expressed as the consideration in the deed executed on March 26, 1934, and he testified that this amount represents the actual investment of appellant in the farm at the time it was sold.

Appellant insists that under the contract, its obligation to pay any further attorney fee to appellee was contingent upon it collecting the same at or prior to the time the land was conveyed to appellant by the Master. Appellant further insists that the evidence discloses that it did not at any time either before or after it received the Master's deed collect any portion of the $400.00 sought to be recovered by appellee and that there is no basis in the evidence to support the judgment of the trial court for $225.00.

up of the following items, viz:

Purchase price, May 14, 1932	$7300.00
Interest thereon to April 1, 1934	881.25
Taxes	57.83
Taxes July 28, 1932	56.95
Interest on taxes to Apr. 1, 1934 = 8%	11.45
Deficiency	1911.68
Interest on deficiency = 8% to Apr.1,1934	187.12
Taxes paid Apr. 12, 1933	112.86
Interest on these taxes to Apr. 1\34	7.14
Drainage tax paid Nov. 17, 1933	12.36
Total	$10745.64
Credit, rents collected	186.97
	10558.67

Mr. Kitchen further testified that the consideration mentioned in the deed made by appellant to Goodenoht on March 26, 1934 was determined and computed by appellant by taking the principal amount of the Goodenoht loan, before the foreclosure suit was filed and adding thereto insurance premium, taxes, abstract fee, mechanic's lien, filing fee, sheriff fees, Master's fees, $50.00 attorney fee paid to appellee and accrued interest to the date of the decree. These various amounts aggregated $8992.83. Next to this amount appellant added interest at the rate of four and one-half per cent to January 15, 1934, amounting to $808.20, and the total of these two items make $9801.03, the amount expressed as the consideration in the deed executed on March 26, 1934, and he testified that this amount represents the actual investment of appellant in the farm at the time it was sold.

Appellant insists that under the contract, it obligation to pay any further attorney fee to appellee was contingent upon it collecting the money or prior to the time the land was conveyed to appellant by the Master. Appellant further insists that the evidence discloses that it did not by any time elapsed before or after it received the Master's deed collect any portion of the $400.00 sought to be recovered by appellee and that there is no basis in the evidence to support the judgment of the trial court for $225.00.

Appellee insists that the evidence discloses that the amount due appellant at the time the decree of foreclosure was rendered, which was April 20, 1932, was $9165.92, that this sum included a solicitor fee of $450.00, that the farm was sold on March 26, 1934 for $9601.03, that the farm was therefore sold for more than the actual cash appellant had in it, and therefore appellee is entitled to recover.

The contract which forms the basis of this suit provided that the usual attorney fee should be proven and that appellant would pay appellee $50.00 for his services and whatever actual fee could be thereafter realized from the foreclosure of the farm, that is, to the extent of the collection of any fee, the entire amount would be remitted to appellee. In the instant case $450.00 was proven and made a part of the foreclosure decree. On April 20, 1932, the decree of foreclosure was rendered and found the amount due appellant to be $9165.92, which included $450.00 solicitor fee. Twenty-four days later the land was sold by the Master. There was due appellant at that time $9411.68. On this date, under the contract, had the land sold for that amount, appellee would have been entitled to receive from appellant $400.00. It did not sell for $9411.68 but for $1911.68 less than that amount. If, on May 14, 1933, a year after the sale, the premises had been redeemed, appellant would have received its $7500.00 and one year's interest under the Statute, making a total of approximately $7950.00. Inasmuch as on the day of the sale there was actually due appellant, as found by the decree $9011.68, after deducting the $400.00 which, if collected, was to go to appellee, of course, appellee would not, under the contract, be entitled to anything if the premises had been redeemed one year after the sale. The premises, however, were not redeemed on May 13, 1933 or at any other time, but the period for redemption expired. On August 19, 1933, appellant received a Master's deed. At that time or upon the receiver making a final report and being

app lies inasmuch that the evidence disclosed that the amount due appellant at the time of the decree of foreclosure was rendered, which was April 20, 1932, was $[illegible].00, that this was increased a solicitor fee of $400.00, that the farm was sold on June 20, 1934 for $801.00, that the farm was therefore sold for more than the actual cash appellant did in it, and that appellee is entitled to recover.

The contract which forms the basis of this suit provided that the usual attorney fee should be given, and that appellant would pay appellee $[illegible].00 for his services and another usual fee could be thereafter realized from the proceeds of the farm, that is, to the extent of the collectible amount, the entire amount would be restored to appellee. In the instant case $400.00 was given and made a part of the foreclosure decree. On April 20, 1932, the decree of foreclosure was rendered and found the amount due sufficient to be $[illegible].00, which included $400.00 solicitor fee. Twenty-four days later the farm was sold by the sheriff. [illegible] at that time $[illegible]. [illegible], under the [illegible] said for that amount, [illegible] would have been entitled to recover from appellee $[illegible]. [illegible] $[illegible].00 but for $1011.00 less than that [illegible] 1, 1932, [illegible] the sale, the [illegible] received its $[illegible].00 [illegible] making a total of approximately $[illegible]. [illegible] or the sale price was actually [illegible] decree $801.00, after deducting $[illegible].00 [illegible] was to [illegible] costs, [illegible] court, be entitled to [illegible] one year after [illegible] on May 19, 1933 or [illegible] expired. [illegible] at that time or upon the expiration [illegible]

discharged, the foreclosure proceedings were terminated. Appellant was the owner of the premises for more than seven months and on March 26, 1934 sold them for $9601.03. There was actually due appellant on May 14, 1932 $9011.68, appellant therefore actually received on March 26, 1934 $589.35 more than was due it on May 14, 1932, and because of this, appellee insists he is entitled to recover. The fallacy of appellee's argument is that $9011.68 was the amount due appellant on May 14, 1932 and he never received $9601.03 until March 26, 1934, more than twenty-two months later. There is nothing in the letter of April 4, 1931 which forms the basis of this suit which says that if after the foreclosure proceedings are terminated and the premises are not redeemed and appellant procures a deed to the land involved in the foreclosure proceedings and that it, seven months thereafter, sells the premises for $400.00 more than was due it twenty-two months before the day it sells the land that then appellee is to receive such $400.00. Such language was not expressly used and we do not believe that the language which was employed can be given any such construction.

There may be some merit in appellant's contention that appellant should only be held for any such sums as it collected up to the time it received a deed for the premises, but the letter did not expressly so state and in view of what we have said, it is unnecessary for us to pass upon that question upon this record.

We are at a loss to know and counsel have not advised us the theory upon which the trial court found that there was $225.00 due appellee. Both parties to this litigation, by their respective briefs, have requested this court to finally terminate this litigation and to either affirm the judgment, reverse it without remanding or enter such judgment as the trial court should have entered. Accordingly the judgment of the Circuit Court of Kankakee County will be reversed.

JUDGMENT REVERSED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. FRED G. WOLFE, Justice.
JUSTUS L. JOHNSON, Clerk.
RALPH H. IESPER, Sheriff.

284 I.A. 656[3]

BE IT REMEMBERED, that afterwards, to-wit: On MAR 24 1936 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 9047 Agenda No. 17

In the Appellate Court of Illinois

Second District

February Term, A. D. 1936.

Roberts Mann and E. C. Curtiss,

Appellees,

vs.

Appeal from the Circuit Court of Du Page County

Dowhers Grove Sanitary District,

a Municipal Corporation,

Appellant,

DOVE, J.

On June 26, 1934 Roberts Mann and E. C. Curtiss filed their complaint in the Circuit Court of Du Page County to recover $2500.00 each from the Downers Grove Sanitary District as commissioner's fees which had theretofore on August 12, 1929 been allowed them by an order entered by the County Court of Du Page County in a special assessment proceeding designated as number twenty-six. An answer, thereafter amended, was filed. Upon motion of the plaintiffs, all of the several paragraphs of the answer except paragraph eight were stricken. The defendant elected to stand upon the portions of its amended answer which were stricken and upon the issue made by the allegations of the complaint and paragraph eight of the answer, a hearing was had before the court, a jury having been waived, upon a stipulation of facts. The trial court found the issues for the plaintiffs and rendered judgment against the defendant for $5,000.00 and the record is in this court for review.

Appellant contends that special assessment proceeding number twenty-six is still pending in the County Court of Du Page County and that therefore the order of the County Court entered on August 12, 1929 was an interlocutory order and not a final one and that inasmuch as the statute provides that the amounts allowed appellees by this order for their services as commissioners may

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be reviewed by the county court upon motion, the judgment of the Circuit Court which is based upon this order or judgment is void for want of jurisdiction. The record in the instant case discloses that appellant abandoned special assessment proceeding number twenty-six and the Supreme Court so stated in the case of Bunge v. Dowhers Grove Sanitary District, 356 Ill. 531. The Bunge case was an action by a firm of attorneys to recover their fees from appellant in connection with four special assessment cases, one of which was this proceeding number twenty-six. In the course of their opinion the court stated that proceeding number twenty-six was for the construction of a sewage disposal plant, including outlet sewer and laterals and was practically identical with proceeding number nineteen which had been dismissed. In its opinion the court further stated that the personel of the board of trustees of appellant changed after the contract with the attorneys had been made and the new board not only repudiated the contract for attorney fees made by the former board, but also abandoned proceeding number twenty-six and constructed an addition to the disposal plant. It was contended in the Bunge case that the District was not liable because its contracts with the attorneys were contingent upon completion of the improvements. The court, however, held that where a special assessment proceeding is not carried to completion, either because of the invalidity of the ordinance or because it is dismissed before confirmation, the municipality cannot avoid payment by setting up the contingent nature of the contract, but is liable out of the general fund. The court further held that the contracts with the plaintiffs having been repudiated, the fact that proceeding number twenty-six had not been dismissed of record presented no defense to the action.

In the instant case, the record discloses that on October 12, 1929 appellant issued a voucher to appellee Mann for $2500.00 and to appellee Curtiss for $500.00 as commissioners, payable out of the funds to be collected in proceeding number twenty-six, that

be reviewed by the county court upon motion, the judgment of the Circuit Court which is based upon the order of judgment is sold for want of jurisdiction. The record in the instant case discloses that appellant abandoned special assessment proceeding number twenty-six and the Supreme Court so stated in the case of Dunne v. Downers Grove Sanitary District, 328 Ill. 327. The instant case was an action by appellee to recover their fees from appellant in connection with the special assessment cases, one of which was this proceeding number twenty-six. In the course of their opinion the court stated that proceeding number twenty-six was for the construction of a sewer-disposal plant, including outlet sewer and interceptors and was practically identical with proceeding number nineteen which had been dismissed. In its opinion the court further stated that the order of the board of trustees of appellant dismissing the case and with the attorneys had been made and the law board not only permitted but contracted for attorney fees made by the commissioners, but also approved proceeding number twenty-six and constituted an admission by the district court. It was contended in the instant case that the district court was not justified because the contracts which the commissioners signed upon completion of the improvements. The court, however, held that there appeared assessments for attorney in no case. In the instant case, either because of the illegality of the contracts or because the litigation missed before completion, the municipality should be saved by setting up the results of numbers of the proceeding, but in lieu out of the general fund. The court further held that the contracts with the plaintiffs having been repudiated, the order in proceeding number twenty-six had not been discussed of [illegible] defense to the action.

In the instant case, the record discloses that on October 12, 1929 appellant issued a notice to appellees for $2000.00 and to appellees Curtis for $800.00 [illegible], upon one of the items to be collected in proceeding number twenty-six, that

the trustees who issued these vouchers were superseded by new trustees on October 29, 1929 and on December 21, 1929 the new trustees repudiated these vouchers and repudiated the liability of the District to pay appellees their fees although their work as commissioners were completed when they filed in the County Court their report and assessment roll. While it is true that no formal order of dismissal has been entered in the County Court in proceeding number twenty-six, still approximately five years elapsed after the order of the County Court was entered which forms the basis of this suit before the instant suit was instituted. During that time no effort has been made to have that order modified and just as the Supreme Court held in the Bunge case, supra, we are inclined to hold in the instant case that inasmuch as appellant repudiated the liability of the District to pay appellees their fees and repudiated the vouchers which the former trustees had issued therefor, and having abandoned proceeding number twenty-six, the fact that no formal order of dismissal had been entered of record in the County Court presents no defense to this action.

Mann v. Downers Grove Sanitary District, 281 Ill. App. 412 was a proceeding instituted by appellees to recover compensation for their services as commissioners in special assessment number nineteen. That suit was based upon an order entered by the County Court of Du Page County indentical with the order which forms the basis of this suit. It appeared in that case that on June 28, 1929 proceeding number nineteen was dismissed by the County Court and the following day an ordinance was adopted providing for the construction of the improvement designated as special assessment proceeding number twenty-six, which is involved in the instant case. Substantially the same contentions were unsuccessfully urged by the District in that case as are urged in the instant case, except, of course, proceeding number nineteen had been formally dismissed, while in the instant case proceeding number twenth-six

is still pending in the County Court, although as we have held, it had been, as a matter of fact, abandoned.

We have read counsel for appellant's argument and have examined many of the cases cited, but there is no necessity for us to repeat what we said in our former decision, as we adhere to that holding. The complaint here, as was the amended complaint in the former case, is based upon a judgment rendered by the County Court. The portions of appellant's answer which were, on motion stricken by the trial court, tendered no issue of fact but consisted of erroneous conclusions of law all determined, either by the Supreme Court or by this court in the cases herein cited, contrary to appellant's theory of the law. That portion of appellant's answer upon which issue was joined set up that appellees had waived fifty per cent of the original amount of their fees. What we said with reference to this in Mann v. Downers Grove Sanitary District, supra, at page 423 is applicable: "It is also contended by the district that the appellees waived one-half of their fees as such commissioners. This contenthon rests upon the voluntary reduction of appellees' fees in the mandamus action above referred to. In the mandamus case the appellees consented to a one-half reduction of their fees in special assessment proceedings Nos. 19 and 26, but it was expressly stipulated by them that the value of the services rendered as such commissioners was not in issue and that they did not waive any rights or defenses which they might have in any other proceeding thereafter instituted by them for the recovery for services rendered as such commissioners. The compromise offered by the appellees was to accept $5,000 in full for their services as commissioners in proceedings both No. 19 and 26. (Vide, Mann v. Downers Grove Sanitary Dist., 266 Ill. App. 526.) The offer has never been accepted by the district, but the right of the appellees to any compensation has been, and still is, being contested by the district."

is still pending in the County Court, although as we have held, it had been, as a matter of fact, abandoned.

We have read counsel for appellant's argument and have examined many of the cases cited, but there is no necessity for us to repeat what we said in our former decision, as we adhere to that holding. The complaint here, as was the amended complaint in the former case, is based upon a judgment rendered by the County Court. The portions of appellant's answer which were, on motion stricken by the trial court, tendered no issue of fact but constituted of erroneous conclusions of law all determined, either by the Supreme Court or by this court in the cases herein cited, contrary to appellant's theory of the law. That portion of appellant's answer upon which issue was joined set up that appellees had waived fifty per cent of the original account of their fees. What we said with reference to this in Wynn v. Downers Grove Sanitary District, supra, at page 452 is applicable: "It is also contended by the district that the appellees had a one-half of their fees as such commissioners. This contention rests upon the voluntary reduction of appellees' fees in the mandamus action above referred to. In the mandamus case the appellees commenced to one-half reduction of their fees in special assessment proceedings Nos. 10 and 26, but it was expressly stipulated by them that the value of the services rendered as such commissioners was not in issue and that they did not waive any rights or defenses which they might have in any other proceeding, whether instituted by them for the recovery for services rendered as such commissioners. The counterclaim offered by the appellees was to account $1,000 for full [illegible] services as commissioners in proceedings both No. 19 and 2. (Vide, Wynn v. Downers Grove Sanitary District, 266 Ill. 4[illegible]). The offer has never been accepted by the district, but the right of the appellees to any compensation has been, and still is, being contested by the district."

There is no reversible error in this record and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

There is no reversible error in this record and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

Opinion filed March 11, 1936

Gen. No. 8973. Ag. No. 16.

IN THE

APPELLATE COURT OF ILLINOIS.

THIRD DISTRICT.

Vacation after January Term, A.D. 1936.

284 I.A. 656

FRANK LIPOVSEK,
Appellant,

vs.

THE SUPREME LODGE of the SLOVENE NATIONAL BENEFIT SOCIETY, a CORPORATION,
and
LOCAL LODGE No. 209 of THE SLOVENE NATIONAL BENEFIT SOCIETY of NOKOMIS, ILLINOIS, a CORPORATION,
Appellees.

Appeal from the Circuit Court of Montgomery County.

DAVIS, J.:

This case is here on appeal from a judgment in favor of appellee, entered by the circuit court of Montgomery county on June 22,1935. It was submitted for determination at the January Term, A.D. 1936, of this court.

Upon examination of the brief of the appellant and the record in the cause, we find that we are without authority to review the case for two reasons. Rule 9 of this court, as amended, identical with Rule 39 of the Supreme Court, as amended, provides in relation to the preparation of briefs, as follows:

"The concluding subdivision of the statement of the case should be a brief statement of the errors or cross errors relied upon for a reversal or of the cross errors submitted by an appellee not prosecuting a cross appeal."

There is no brief statement of the errors relied upon for rever-

sal in the concluding subdivision of the statement in appellant's brief. Such statement of errors takes the place of the assignment of errors relied upon prior to the enactment of the Civil Practice Act, and if the brief does not contain such statement of errors this court is without authority to review the case.

It is true that assignment of errors are attached to the record in this case, but such assignment of errors under the present Rules of Practice and Procedure avails appellant nothing. Rule 1 (2) of this court and Rule 36 (2) of the Rules of Practice and Procedure of the Supreme Court.

The opinion filed in this court on February 29,1936, in the case of Bender, Admx. etc., vs. The Alton Railroad Company, No. 8969, is decisive of this question.

Because of a misprison of the clerk no final judgment was ever entered in the case. All that is shown by the record is as follows:

It is now ordered and adjudged by the court that the court finds for the defendants in this cause and against the plaintiff, and it is further ordered by the court that the plaintiff pay the costs incurred in this cause, and the plaintiff now enters his exceptions in this cause.

This is not a final judgment and does not dispose of the case on its merits. A final judgment is one which fully decides and finally disposes of the rights of the parties. Smith vs. Bunge, 358 Ill. 229. Puterbaugh's Common Law Pleadings, Sec. 1096.

This court can only entertain an appeal from a final judgment entered in the cause, except in interlocutory orders concerning injunctions and receivers. Section 77, Civil Practice Act. Ill. State Bar Stats. 1935, chap. 110, par. 205.

No final judgment having been entered in said cause and appellant's brief not containing in the proper place any statement of errors relied upon for a reversal this court is without jurisdiction

to hear and determine the matters involved in said cause.

For the reasons pointed out said appeal is dismissed at the cost of appellant.

Appeal Dismissed.

to hunt and [illegible]

For the reason [illegible]

most of appeal is.

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

No 14

Agenda 7.

October Term, 1935.

Elsie Reiff, a Minor, by Susan Reiff, her Mother and Next Friend, Appellee, vs. Henry Mirring and Henry Schieber. Henry Mirring, Appellant.	Appeal from Circuit Court of St. Clair County.

284 I.A. 657

EDWARDS, P. J.

Appellee, a minor, by next friend, brought suit against Henry Mirring, appellant, and one Henry Schieber, to recover damages for injuries sustained by a collision of the car driven by Schieber with that operated by appellant, in which appellee was riding as a guest passenger. Upon a jury trial there was a verdict in favor of Schieber; appellant, however, was found guilty and damages were assessed at $1,600. The trial court required a remittitur of $600, and rendered judgment for $1,000, which appellant seeks to reverse by this appeal.

The action is based upon Sec. 58a, Ch. 95½, Smith-Hurd R. S. 1935, providing that a guest passenger in an automobile shall have a cause of action against the driver for injuries sustained through his willful and wanton misconduct.

The only proposition argued by appellant is that the verdict is not sustained by the evidence upon the point of willful and wanton misconduct.

In order to constitute willful and wanton misconduct, the injury resultant must have been intentionally inflicted or occasioned by acts so grossly negligent as to indicate a reckless disregard for the safety of others. Provenzano v. I. C. R. R. Co., 357 Ill., 192; Brown v. Illinois Terminal Co., 319 Ill., 326.

The testimony shows that on the evening of November 7, 1933, at about 8:20 o'clock, appellee was riding as a guest passenger in a car driven by appellant in a westerly direction along a paved State highway towards East St. Louis. At a point near Mounds State Park there was a barricade on the north side of the road; this extended half way across the pavement, and was between 20 and 30 feet long. At the time in question the barricade was indicated by seven lights, three on each end and one in the center of the slab. It appears that when appellant approached this barricade he slowed down, after which he started to go around it at a slow rate of speed, perhaps 5 miles an hour. After he had passed the east end and was coming parallel with the south side of the barricade, appellee testifies that she told him a swiftly running car was coming from the west, but appellant denies such statement. At this time defendant Schieber's car was approaching the barricade from the west, traveling at the rate of 30 or 35 miles an hour, and at the time appellant entered the road opposite the barricade, was about 50 or 60 feet distant. The two cars collided head-on about the middle of the distance between the ends of the barricade. As a result of the accident appellee sustained certain cuts, bruises and other injuries to her face, among others a diverting of her nose slightly to one side.

It further appears that previous to the accident, appellee and appellant, who had been riding around somewhat for pleasure, had stopped at a roadhouse where each drank a glass of beer, and appellant purchased a quart of wine which he admits taking at least one drink of. It further is shown that immediately after the accident, a highway policeman found

the wine bottle in appellant's car, and that same was but partly full.

At the south side of the pavement was a shoulder, at about the level of the cement slab, composed of chat, and which was sufficiently wide for an auto to have safely turned onto. Schieber's car, as it approached, had its headlights burning, and were seen by appellant, as he admits, at least 100 feet west of the barricade. Appellee testifies that as soon as the cars stopped she said to appellant: "See what you did;" and that he replied: "I thought he would turn off or slow down." The latter denies such statements.

Appellant invokes the benefit of Sec. 161a, Ch. 121, Smith-Hurd R. S. 1933: "Whenever there is a single track paved road on one side of the public highway, and two vehicles meet thereon, the driver on whose right is the wider shoulder shall give the right of way on such pavement to the other vehicle." He claims that Schieber should have turned onto the shoulder to the south of the pavement, and that appellant had a right to rely upon the presumption that he would do so.

We think the section quoted was intended to cover situations where, as therein provided, there is but a single paved track and where, ordinarily, two vehicles could not pass thereon, and not to a pavement which is double tracked and one lane of which is temporarily closed at a particular point for repairs or other improvement.

Whether the conduct of appellant, under the circumstances, was willful and wanton, within the limits of the rule as stated, was a question of fact, and the jury's finding thereon should not be disturbed unless it be manifestly against the weight of the evidence.

It seems rather strange that appellant, seeing the approach of Schieber's car, with its headlights burning, should slow down his own car and remain on his own side of the pavement, if he believed, as contended, that Schieber was under any obligation to turn to the shoulder on the south side of the cement slab. That he did slow down, as he

says, to see what Schieber was going to do, shows that he was fully cognizant of the situation and of the danger of attempting to enter the south lane of traffic with the other car approaching at a rate of speed which he admits was about eight times faster than that at which he was running. He says that when 25 feet from the barricade he slowed down, and that Schieber was then perhaps 200 feet away and coming at a high rate of speed. Common sense would teach, under such circumstances, that if he, at 5 miles an hour, should turn to pass onto the south lane of traffic, with Schieber's machine then 50 or 60 feet from him as he testified, he was almost certain to collide with the latter's car, and especially if it be a fact, as testified by appellee, that she warned him of the swift approach of the other car. The attendant circumstances indicate that he acted with indifferent disregard to consequences, not only as respected appellee and Schieber, but with an almost abandoned unconcern as to his own welfare.

We think the jury were warranted in finding that appellant's conduct was willful and wanton, as the term is defined by the decisions of our Supreme Court, and as this is the only question argued, the judgment will be affirmed.

Judgment affirmed.

Not to be published in full.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1935

Term No. 1 | Agenda No. 12

LILLIAN ZOLLICOFFER,
Plaintiff-Appellee,

vs.

SEABOARD FIRE & MARINE INSURANCE COMPANY OF NEW YORK, a Corporation,
Defendant-Appellant.

APPEAL FROM THE CITY COURT OF THE CITY OF WEST FRANKFORT, ILLINOIS.

284 I.A. 657

Murphy, J:

On February 23, 1933, appellant issued an insurance policy insuring the household goods of appellee against loss by fire. The property described in the policy was destroyed by fire January 2, 1934. Appellant denied liability and appellee instituted an action in assumpsit and recovered a judgment for $750 from which appellant has appealed.

The issue raised by the pleadings, evidence and upon which the reversal of the judgment is sought, is that the insured property was mortgaged at the time of the issuance of the policy and that the existance of such mortgage was not made known to appellant. Appellee pleads a waiver of this provision of the policy.

The policy was what is known as a standard form policy and contained a provision that any misrepresentation or concealment of any material fact or circumstance would vitiate the policy "or, if the interest of the insured in the property be not truly stated herein" becomes void.

It also contained the condition that no provision of the policy should be deemed or held to be waived unless such waiver be in writing and attached to the policy and that no privilege or permission effecting the insurance could be claimed by the insured unless in writing and attached to the policy.

It contained this further material provision "that in any matter relating to this insurance no person unless duly authorized in writing shall be decreed the agent of this company".

Appellee admitted that at the time of the issuance of the policy the property was mortgaged. Unless there was a waiver, this barred the action. Pollock v. Connecticut Fire Ins. Co., 362 Ill. 313. Appellee contends that at the time of procuring a revewal of the loan, she had a conversation with Mr. Speer, general agent of the company and the one who had written the insurance and told him of the mortgage lien and that the company continued to carry the risk and therefore waived the requirement as to title.

The express provisions of the policy was that before a waiver would be binding upon the company, it must be in writing and attached to the policy. The proof offered by appellee in reference to the conversation with Speer does not meet that requirement.

Where a policy, already issued and delivered, contains a condition which, by the terms of the instrument, can be waived only in writing, and by a certain officer named, an attempted parol waiver by another does not bind the insurance company. Phoenix Ins. Co. v. Maxson, 42 Ill. App. 164; Dwelling House Ins. Co. v. Shaner, 52 Ill. App. 326.

The judgment of the lower court is reversed.

Judgment reversed.

Not to be published in full

43 4

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1935

Term No. 3 | Agenda No. 31

ELLA ASHFORD, Administratrix of the Estate of JOHN ASHFORD, Deceased, Appellee,	No. 5. APPEAL FROM THE CIRCUIT COURT OF HARDIN COUNTY, ILLINOIS.
vs.	
RUSSELL ASHFORD, Appellant.	

284 I.A. 657[3]

Murphy, J:

Appellee moved to dismiss this appeal on account of the alleged failure of the defendant to observe the rules of court in reference to the time of filing transcripts of proceedings, abstract of record and briefs and arguments in this court and while there was a flagrant violation of the rule which under the showing would justify its dismissal, we have elected to overrule the motion to dismiss and to dispose of the case on its merits.

March 6, 1930, John Ashford, plaintiff's intestate, and defendant executed a promissory note for $1000.00 payable to the State Bank of Rosiclare and delivered the same to the said bank. The note was for borrowed money and the account of the defendant in said bank was credited with the whole of the $1000.00.

May 24th following, John Ashford died and plaintiff, his widow, was appointed administratrix. As administratrix, she paid the bank the whole of said note, principal and interest being $1092.11.

Plaintiff instituted this suit to recover the amount she paid on the theory that the obligation was the indebtedness of defendant. The case was tried before the court without a jury and after hearing evidence, a judgment was entered against the defendant for $546.05, being one-half the amount plaintiff paid to the bank.

Defendant admitted the execution of the note and the credit of the whole amount to his account but contended that it had been paid to the deceased in his lifetime. He introduced the evidence of four witnesses who testified to a conversation between the defendant and the deceased on the same date the note was executed. Each of them testified that defendant gave John Ashford $575.00 in currency and that it was referred to in the conversation as being payment on a note. None of the witnesses testify that the conversation in any way connected the money payment with the note given at the bank.

Other witnesses testified for defendant that on another occasion when they were in the presence of defendant and John Ashford, defendant paid John Ashford $425.00 and that John Ashford said at that time there would be no charge for interest.

Plaintiff introduced evidence to the effect that after she was appointed administratrix, she had various conversations with the defendant in reference to the note in which she demanded payment and that defendant did not deny liability. On one occasion, she proposed that to avoid trouble she would accept $500.00 and there was conversation relative to giving a note and mortgage for it. Evidently, the trial court adopted this offer of compromise as of sufficient importance to be an account stated and entered judgment for one-half

the amount of the claim. No cross appeal was taken and therefore the only question to be decided is, does the evidence sustain the judgment.

Where a case is tried before a court without a jury, on appeal, the court of review cannot disturb the judgment and findings unless it is manifestly against the weight of the evidence. In such a case, the findings of the trial court stand on the same basis and the same weight is to be attached to them as a verdict of the jury.

The evidence introduced on rebuttal by the plaintiff tended to impeach the defense of payment. To determine the issue and arrive at a conclusion the court was required to weigh the evidence and give credit to the evidence accordingly. The finding of the trial court was warranted by the evidence.

For reasons assigned, the judgment of the lower court is affirmed.

Judgment affirmed.

Not to be published in full.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1935.

Term No. 20 | Agenda No. 21

J. E. CARR, for the use of DOROTHY KAZAKIS, Plaintiff and Appellant,

vs.

WILLIAM L. O'CONNELL, Receiver of the First State Savings Bank of West Frankfort, Illinois, and A. L. Burpo, City Treasurer of the City of West Frankfort, Illinois, Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, ILLINOIS.

284 I.A. 657

Murphy, J:

The First State Savings Bank of West Frankfort, ~~Illinois~~, was adjudged insolvent and a receiver was appointed April 24, 1930. At the time the bank closed, the city of West Frankfort had on deposit in said bank $9386.27.

The city employed J. E. Carr, an attorney, plaintiff herein, to represent it in its litigation against the receivership. A petition was filed on behalf of the city for the allowance of the claim and after a hearing, a decree was entered directing the receiver to pay the amount of the claim to the treasurer of the city. The decree also directed the city treasurer to divide the funds, a part to go to the general corporate fund and a part to various special assessment funds. Carr filed a petition in the receivership proceeding to impress a lien for his fees. The sum of $3584.43 was ordered credited to the general corporate fund and from this amount the city treasurer was ordered to pay to Carr $500.00 as his attorney's fees. It was also ordered that before making such payment to Carr he should surrender the warrants which had been issued to him by

the city. Before the receiver paid the funds to the city treasurer, Dorothy Kazakis brought this garnishment suit on a judgment which she had obtained in the circuit court of Franklin County against Carr and one D. C. Crawford. She summoned as garnishees A. L. Burpo, city treasurer, and William L. O'Connell, receiver.

Burpo, as city treasurer, filed a motion to dismiss the garnishment proceeding against him for the reason that the city treasurer was not subject to garnishment. The court sustained said motion. William L. O'Connell, receiver, answered the interrogatories and set up the provisions of said decree and denied that he had any money in his hands as such receiver which he was obligated to pay to J. E. Carr. The court sustained the receiver in his answers and dismissed the garnishment proceeding as to him. Plaintiff has appealed to this court from the order of dismissal as to each of the garnishees.

Plaintiff contends that the city treasurer is in default in this court and his contention should not be considered since he failed to file a notice of appearance. Paragraph 3, Rule 35, Supreme Court, 355 Ill. 34, where it provides that any appellee who fails to serve and file a notice of appearance shall be deemed in default is relied upon. The Supreme Court at the June term, 1935, amended Rule 35 so that failure of an appellee to file a notice of appearance is not a default. 361 Ill. XIV. This appeal was filed since the amendment of the rule and plaintiff's contention is without merit.

A garnishee is limited in his right of recovery to such credits as could be recovered in a suit in assumpsit or debt brought by the judgment debtor against the garnishees.

Pogline v. Central Mut. Ins. Co., 280 Ill. App. 5 ; Swope v. McClure, 239 Ill. App. 578; Webster v. Steele, 75 Ill. 544.

The fund from which the $500.00 was to come was in litigation in the receivership proceeding and therefore in custodia legis. The rights of all the parties to that $500.00 is to be determined by the decree entered in that proceeding. Under the decree, the receiver was directed to pay the whole of the fund, which included the $500.00, to the city treasurer. There was no direction to pay it to Carr and the decree did not even impress a lien upon it while it remained in the possession of the receiver. Under such condition, it is apparent that Carr could not have sued the receiver in an action at law to recover the sum and it therefore follows that the plaintiff was not entitled to a judgment against the receiver.

The court's ruling in sustaining the city treasurer's motion to dismiss the garnishment proceeding as to him presents the sole question, whether a garnishment proceeding can be maintained against a city by summoning its treasurer. Although it has been extensively argued, we are not called upon to consider the effect of the condition in the decree that Carr was to surrender to the city treasurer certain city warrants before receiving payment, or the fact that the money had not at the time of the service of the garnishment summons on the treasurer been paid by the receiver to him. The order appealed from is the order of dismissal entered on the treasurer's motion.

Plaintiff's affidavit upon which the garnishment proceeding is based avers that A. L. Burpo, city treasurer, is indebted to Carr or has property of Carr's in his possession. This is a direct proceeding against Burpo as city treasurer and undertakes to garnishee the fund held by Burpo as city treasurer.

It has long been the settled law of this state

that funds held by a city to be paid to another was not the subject of garnishment. Merwin v. City of Chicago, 45 Ill. 133, and that the treasurer of a city who is holding the money as the agent of the city is not liable to the process in respect of any money held by him by virtue of his official authority. Triebel v. Colburn, 64 Ill. 376. In the Merwin case, supra, it was held that the matter could be disposed of on motion of the city official and without answer.

The judgment of the circuit court was correct and is affirmed.

Judgment affirmed.

Not to be published in full.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1935

Term No. 28 | Agenda No. 27

WILBUR FAITH,
Plaintiff, Cross-Defendant
and Appellant,

vs.

HOME LOAN & IMPROVEMENT ASSOCIATION, a Corporation,
Defendant, Cross-Plaintiff,
and Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
FRANKLIN COUNTY.

284 I.A. 658

Murphy, J:

September 21, 1922, Clyde Russell owned a certain lot in the City of West Frankfort and on that date, by written contract, covenanted to convey it to Wilbur Faith. The purchase price was $3250.00, $1250.00 of which Faith was to pay Russell in monthly installments of $23.00 with interest on the deferred payments. For the balance of the consideration, Russell covenanted to mortgage the lot to the Home Loan and Improvement Association for $2000.00 and the amount so borrowed was to be paid to Russell and Faith was to have credit for that amount on the contract. By the contract, Faith covenanted "to make the monthly payments of dues and interest payments on this mortgage to the Home Loan and Improvement Association".

Pursuant to the contract, the note and mortgage to the loan association was executed by Russell and wife on October 12, 1922. The note which is set out in full in the mortgage provides that the loan is $2000.00 which is to be paid monthly, ten dollars dues on the stock, ten dollars interest and

seven dollars premium, each monthly payment to be made on the 10th of the month.

Faith made the regular monthly payments to Russell until the whole of the $1250.00 with interest was paid and on February 17, 1927, Russell and wife conveyed the lot by warranty deed to Faith. The deed contained this clause, "This deed is made subject to the balance due on a mortgage of $2000.00 in favor of the Home Loan and Improvement Association, West Frankfort, Illinois."

The evidence shows the mortgage referred to in the excepting clause of the deed was the same mortgage provided for in the contract. Faith made the monthly payments to the loan association, beginning in November, 1922, Russell having made the first, and continuing until he paid one hundred and six payments of $27.00 each. Each payment was entered in Faith's pass book and showed $10.00 dues, $10.00 interest and $7.00 premium.

In October, 1932, Faith filed a bill against the loan association to redeem alleging that the mortgage and note was usurious, that he had paid all that was legally due, prayed for an accounting and a cancelation of the mortgage instrument. The loan association answered denying the usurious allegation and filed a cross bill to foreclose the mortgage. The evidence was heard before the court and a decree was entered dismissing the original bill for want of equity, granted the prayer of the cross bill and ordered a foreclosure of the mortgage. Faith appeals from that decree and will be referred to as plaintiff and the loan association as defendant.

Plaintiff has argued some matters in this court which defendant contends were not raised in the lower court.

We have made a close examination of the record and find that it sustains defendant's contentions. A part of the things argued were not made an issue by the pleadings and other matters which were dependent upon objections to the evidence were either not objected to or the objection was general and did not point out the reason urged here.

The only issue presented to the trial court and which can be considered here is whether plaintiff is estopped to raise the question of usury and if he is not estopped, whether the note and mortgage were usurious.

It is our opinion that plaintiff is estopped from asserting usury and therefore the second proposition need not be discussed.

The contract of purchase between plaintiff and Russell provided that this mortgage debt was to be taken as a part of the purchase price and plaintiff agreed to pay the debt to the loan association. When plaintiff received his deed in 1927, the mortgage debt was excepted from the warranties in the deed and in the one hundred and six payments made by plaintiff, he knew the amount of the debt, the monthly payments and items that made the total. He contracted that Russell should borrow $2000.00 from the defendant, that he would pay monthly dues to the defendant and would pay $1250.00 the balance of the purchase price to Russell in monthly installments.

The right to plead usury is ordinarily a personal one and a grantee of a mortgagor in the absence of an agreement to the contrary may interpose it as a defense. But it is equally well settled that such grantee can by his contract be deemed to have waived it. Where a person buys real estate encumbered by a usurious mortgage lien and deducts the whole amount of such usurious loan from the purchase price, or where

he assumes and agrees to pay such mortgage as a part of the consideration, he will be deemed to have waived the defense of usury. He, having agreedto pay a certain price for the property and having taken credit for the amount of the usurious loan,equity will not permit him to later plead usury and thus profit by the defense. Crawford v. Nimmons, 180 Ill. 143; Schiele v. Anderson, 252 Ill. App. 390; Franklin County Bldg. & L. Ass'n v. Blood, 255 Ill. App. 175; Wilson v. Reed, 262 Ill. App. 250.

Plaintiff contends that the usurious feature of the loan lies in the $7.00 per month premium and that in his contract with Russell, he contracted for a loan at a legal rate and therefore is not estopped to interpose the defense against that item. The contract will not bear that construction. Furthermore, plaintiff made the payments one hundred and six times and in 1927 accepted a deed subject to unpaid balance of the mortgage and in so doing he took credit on the purchase price for $2000.00. He agreed to pay the loan with all the incidents of interest payments, stock dues and premiums as provided for in the note and mortgage.

The decree of the circuit court is affirmed.

Decree aifirmed.

Not to be published in full.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1935

Term No. 29 | Agenda No. 9

VIOLET P. HARRISON
and
EARNEST E. HARRISON,
Appellees,

vs.

THE CITY OF EFFINGHAM,
Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
EFFINGHAM COUNTY.

284 I.A. 658

Murphy, J:

Plaintiffs brought this suit against the City of Effingham to recover damages alleged to have accrued to their property. The defendant permitted and kept on property adjacent to plaintiffs', an open sewer, referred to in the record as "Stink Run", and a sewage disposal plant and it is claimed by plaintiffs that their well was damaged by seepage from the sewer, that noxious odors and gases passed on to their property and that the open sewer was a breeding place for mosquitoes and other insects, that it interfered with their health and their enjoyment of their home and depreciated the value of their property.

The claim for damages is limited to five years next preceeding the filing of the suit. It is pleaded, and admitted by the answer, that at the beginning of the five year period, the atmospheric conditions on plaintiffs' property was pure and wholesome but the defendant denies that its sewer outlet and disposal plant caused the condition complained of.

The principal conflict in the evidence is as to the extent of the odors passing over the property and

the damages sustained and under the errors urged for reversal it would not serve any useful purpose to discuss the evidence in detail. The case was tried before a jury and resulted in a verdict and judgment for plaintiffs for $700.00

Errors relied upon for reversal are upon the admission of evidence, instructions given and that the verdict is excessive.

Plaintiffs were permitted to prove over defendant's objection that a minor child became ill by drinking water from the well. Such evidence was proper. In the City of Litchfield v. Whitenack, 78 Ill. App. 364, a case to recover damages caused by noxious odors and gases, the court held that such evidence would aid the jury in determining whether and to what extent the plaintiff and her family had been deprived of the wholesome and comfortable use of her home by the stenches and offensive odors from the sewer and ravine. It showed the extent and character of the injuries sustained by the plaintiff and as tending to prove that the nuisance objected to was capable of inflicting the injuries complained. To the same effect see, Wylie et al v. Elwood, 134 Ill. 286; Cooper v. Randall, 59 Ill. 317; Gempp v. Bassham, 60 Ill. App. 84. There was no error in the admission of such evidence.

Defendant complains that the court erred in instructing the jury that they should take into consideration damages sustained by the child by reason of its illness, damages to growing crops and damages for the infestation of the premises by mosquitoes and other dangerous insects.

The instructions were in narrative form and the court in a general way referred to the pleadings wherein it was alleged that by reason of the offensive gases and odors some of the members of the family had been made ill, that the

open sewer created a breeding place for mosquitoes and that they infested plaintiffs' property and plaintiffs were by reason of various annoyances prevented from growing fruits and vegestables on their land. The court further instructed the jury that if these allegations had been proven by a preponderance of the evidence, plaintiffs would be entitled to recover for such injuries as the offensive smells and odors have occasioned to their health, peace and comfort. But there is no place in the instruction where the jury was authorized to take these elements into consideration in any way other than as it effected the plaintiffs' enjoyment of the premises. Defendant's objection to that part of the instruction which refers to the mosquitoes is that there is no proof that mosquitoes are dangerous. It is common knowledge that mosquitoes are carriers of disease germs and everyone knows that an attack by mosquitoes on a still, warm and sultry evening is very annoying and to hold that proof had to be made of a thing of such common knowledge, would be to infer that courts and juries knew less about mosquitoes than everyone else. We do not find any reversible error in the instructions.

In actions of this kind, there cannot be an accurate measure of damages as to the quantity. Where there is not a legal measure of damages and where the damages are unliquidated and the jury fixes the damages, the court will not ordinarily interfere with the verdict. It is the province of the jury, under appropriate instructions of the court to decide such cases and the law does not recognize in the court the power to substitute its own judgment for that of the jury. City of Litchfield v. Whitenack, supra; I.C.R.R.Co. v. Simmons, 38 Ill. 242.

The verdict was warranted by the evidence and the record is free of reversible errors.

The Judgment of the lower court is affirmed.

Judgment affirmed.

Not to be published in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM A. D. 1935.

47 H

m No. 24

Agenda No 5

LOREN CLAYTON, Plaintiff and Appellant,	)	Appeal from the
vs.	)	Williamson County
T. J. MAXEY, Defendant and Appellee.	)	Circuit Court
		Hon. R. T. Cook, Judge Presiding.

284 I.A. 658

STONE, J:

This is an action of Forcible Detainer for the possesion of certain land described in the complaint. Suit was brought before a Justice of the Peace where the decision was in favor of the plaintiff. An appeal was taken to the Circuit Court, where judgment was rendered for the defendant from which judgment this appeal was taken.

The land in question was sold under execution, against appellee, purchased by the Receiver of the Citizens State Bank of Johnston City, Illinois, and a Sheriff's Deed, made conveying the land to the Receiver who then sold and conveyed it to the plaintiff below.

Prior to this conveyance, Mr. Mitchell, then Receiver of said Bank, at the request of T. J. Maxey, defendant below, rented the land to said Maxey at a rental of one-third of the crop and Maxey paid the crop rent to Mr. Jones who succeeded Mr. Mitchell as Receiver of said bank. He also offered to pay rent to Mr. Jackson, Deputy Receiver under William L. O'Connell, successor Receiver.

The defense to the suit is that appellee occupies the premises as a homestead. The evidence shows that he acquired possession of the property by warranty deed, about 1900, moved there immediately with his wife and family, has lived there ever since and lives there now. At the time the premises were sold to satisfy judgments against appellee, or some time thereafter,

appellee began paying rent to appellant for the premises, as he said, under the mistaken belief that because of the judgments he had no further interest in the premises.

Chapter 1 of our Homestead Act provides that "Every householder having a family shall be entitled to an estate of homestead therein to the extent and value of one thousand dollars, in the farm or lot of land and buildings thereon owned or rightly possessed by lease or otherwise and occupied by him or her as a residence; and such homestead and all right and title therein shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided."

There is no question but at the time of the sales through which appellant claims title, appellee had a right of homestead in the premises described in the complaint. Having that right of homestead it could not be taken away from him by the sales. This is elementary. In Immoff vs. Lipe, 162 Ill. 282, it was held, "The debtor is required to perform no act, to discharge no duty, nor to manifest an intention to avail himself of the benefits of the Homestead Act." It was the duty of the officer having the executions to set it off to him, or at least to refrain from undertaking to sell it. A judgment creates no lien against a homestead where it is of less value than a thousand dollars.

Appellant contends that this is an attempt to adjust questions of title in a Forcible Entry and Detainer Suit, which may not be done. We do not so regard it, nor do we interpret the authorities cited by appellant as applicable to this case. We know of no rule of law that deprives one in possession of real estate from setting up the defense in a Forcible Entry and Detainer suit that he is the actual owner of the property and not a lessee. Having such homestead, appellant might, if he wished, have disposed of it in manner prescribed by law. This he never did so far

as the evidence in this case discloses. Nor was it ever extinguished by operation of law. Certainly, in our judgment the paying of rent on the premises to the claimed owner was not a waiver of appellee's right of homestead. In VanWinkle vs. Weston, 276 Ill. App. 66, the Court said, "An action for Forcible Entry and Detainer will not lie to secure premises occupied by a homestead." To the same effect is Voss vs. Bezgis 343 Ill. 451 and Krupp vs. Brand 200 Ill. 403. These cases seem to settle all the questions here involved so we are not concerned about what counsel for appellee contends was the failure of appellant to make a prima facie case in the premises.

According to this record appellee occupies the premises here involved as a homestead and the same is not subject to judgments at law of any kind. The trial court, therefore, ruled correctly in finding the issues for appellee. The Judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Not to be published in full

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM A. D. 1935

48 H

TERM NO. 27. AGENDA NO. 26.

WALTER BECKER, GLADYS BECKER and WALTER EUGENE BECKER by WALTER BECKER, His Next Friend. Plaintiffs--Appellees vs. ROY PARKS, Defendant--Appellant.	Appeal from the Circuit Court of Alexander County.

284 I.A. 658

STONE, J:

The suit was brought by appellees on January 18, 1935, to recover damages for injuries alleged to have been sustained by them on August 11, 1934, in an automobile accident which occurred on that day on Illinois State Route No. 150 and which the complaint alleges were caused by the negligent operation of the automobile of appellant, Parks, which it states was driven, operated and controlled by his agent.

The complaint is in four counts, each of which in paragraph 7 alleges as follows:

(a) Willfully and wantonly drove said automobile at a dangerous rate of speed, to wit, in excess of sixty miles an hour, etc., and willfully and wantonly drove his said automobile into and against the Becker car.

(b) Willfully and wantonly drove, etc., contrary to provisions of Section 22 of Motor Vehicle Law.

Specific details of all material allegations of the complaint were filed. A trial was had resulting in a verdict for Walter Becker under the first count for $300. On the second count for $3,000. A verdict on the third count in favor of Gladys Becker for $1500 and a verdict on the fourth count in favor of Walter Eugene Becker for $800.

A motion for a new trial was denied and judgments were rendered in accordance with said verdicts. Defendant appellant has brought the case here on appeal assigning many errors. Among them that the court erred in refusing to give the peremptory instruction offered by defendant appellant at the close of all the evidence for the plaintiff, to find the defendant not guilty under the allegations in the complaint alleging wilful and wanton negligence by the defendant by his agent.

The appellees have filed no brief and have made no attempt to justify these judgments on any grounds. Rule 9 of thisCourt provides:

> "Each party shall file a printed brief in the cause*** The brief of appellee shall contain a short and clear statement of the propositions by which he seeks to meet the alleged errors and to sustain the judgment or decree by which such errors are obviated."

Appellees are clearly in violation of this rule. They have given nothing to the court and therefore deserve nothing from the court. However, error in this record is so obvious that we are reversing and remanding it in order that appellees may have a trial on the merits of their cases, free from such errors, notwithstanding their violation of the rules of this court.

To constitute a wanton act, the party doing the act must be conscious from his knowledge of surrounding circumstances and conditions that his conduct will naturally and probably result in injury and there must be an intentional disregard of a known duty necessary to the safety of the person of another; further an entire absence of care for the life or person of others. Toneary vs. C. & I. Traction Co. 306 Ill. 398; Bernier vs. I. C. R. R. 296 Ill. 464; Walldren Express Co. vs. Krug 291 Ill. 478; Provenzano vs. I. C. R. R. Co. 357 Ill. 192; Enochs vs. Trovett 229 Ill. App. 235; Kinnare vs. C. C. C. & St. L. Ry. Co. 217 Ill. App. 296.

At the close of plaintiffs' evidence the Court was requested to instruct the jury to find the defendant not guilty under the parts of the complaint attempting to allege that the injuries to plaintiffs were caused by the willful and wanton conduct of the defendant; that request was repeated at the close of all the evidence. (Abs., P. 10). The request was refused.

It will be seen that subdivision (a) of the count in the complaint is based entirely upon the speed of the automobile driven by Abernathie, who was driving Parks' car, as alleged in the complaint "That a high and dangerous rate of speed, at, to wit, in excess of 60 miles per hour on a public highway No. 150." If the statutory provision can be construed as a speed regulation, a violation of a speed regulation will not, standing alone, furnish sufficient evidence that an injury was wantonly and willfully inflicted.

As said in Knochs v. Trovett, 209 App. 835, on page 840 (Third Dist.):

> "The main controversy in this case raises a question of law, namely, whether a willful violation of the statutory speed limit fixed by the Motor Vehicle Act, or a willful violation of a city ordinance regulating the manner of turning vehicles at street intersections, which is alleged to have occasioned an injury, is sufficient proof that the injury was willfully or wantonly inflicted. The facts proven do not justify the inference that the defendant willfully, wantonly or intentionally injured the plaintiff, nor do they show that he ran his car in such a wantonly reckless manner as to justify the presumption of a general intention to injure (Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; Chicago City Ry. Co. v. Jordan, 215 Ill. 390; Kalinski v. Williamson County Coal Co., 267 Ill. 247). It has been repeatedly held that the violation of the speed limit law fixed by statute, or the violation of the provisions of a city ordinance regulating the driving of vehicles, is not of itself proof of willfulness in the infliction of an injury upon a person, though such violation be an unlawful act (Illinois Cent. R. R. Co. v. Hetherington, 83 Ill. 510; Blanchard v. Lake Shore & M. S. Ry. Co., 126 Ill. 416; Illinois Cent. R. Co. v. O'Connor, 189 Ill. 559; Pittsburgh, C., C. & St. L. Ry. Co. v. Kinnare, 203 Ill. 390; Henning Brewing Co. v. Atchison, T. & S. F. Ry. Co., 180 Ill. App. 514)."

There must be other facts shown which, taken with violation of a speed statute, establish a wanton and willful injury. What are the facts? The complaint alleges it was a state highway; the state maintained it. The undisputed evidence shows it was a straight, level highway, surfaced with standard gravel, and was from fourteen to eighteen feet wide on the top. It was not a one-way road, and to say there was not ample space for two cars to pass upon it is not supported by anything in the evidence. Nor is there a scintilla of evidence that Abernathie, who was driving the car, "must have been conscious from the surrounding conditions" that his passing a

car on that road "would naturally and probably result in injury" if the car were passed at 60 miles an hour. There was nothing in the physical facts, as testified to by plaintiffs' witnesses, to indicate in the driver "a conscious indifference to consequences and an entire absence of care for the life, person or property of others" (Streeter v. Hurrichouse, 357 Ill. 134 (138). The day was not foggy or rainy, but clear; the state highway was not wet, slick or muddy, and not gullied or in any respect a dangerous road to travel upon. It may be said that the driver's action was indiscreet or even negligent, but to say that it was willful and wanton as defined by the courts of this state is not justified by and evidence in the record. There is a vast difference between an injury caused through negligence and one wantonly and willfully inflicted.

From January v. C. & I. Traction Company, 306 Ill., beginning at bottom of page 397 and continuing on 398, the Supreme Court appears to have stated the things which must be proved by a preponderance of the evidence in order that the acts of a defendant be declared to be willful and wanton. The opinion says:

> "To constitute a wanton act, the party doing the act or failing to act must:
> "1. Be conscious of his conduct, and
> "2. Though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances of existing conditions, that his conduct will naturally and probably result in injury.
> "3. Or there must be an intentional disregard of duty necessary to the safety of the person or property of another and at the same time an entire absence of care for the life, person or property of others such as exhibit indifference to consequences.
> "If those facts are proven, there is made a case of constructive or legal willfulness".
> "Negligence, even when gross, is but an omission of duty. It is true that it was not necessary to sustain the charge of willful or wanton injury; that the plaintiff should prove an intention on the part of the servants of defendant to drive the car upon the deceased or that they entertained an ill-will against him, but in such case it would be necessary to prove, not negligence merely, of any degree, but such conduct as would show a general intent to inflict injury."

Chicago City Ry. Co. v. Jordan, 215 Ill. 390 (397).

All the evidence viewed in its most favorable light for appellees did not tend to show wilful and wanton misconduct on the part of the driver of appellant's car. The court committed reversable error in not peremptorilly instructing the jury that there could be no recovery

for wantoness or willfulness, on the part of the driver of appellant's car.

The judgments are reversed and the cause remanded to the Circuit Court of Alexander County for a new trial.

REVERSED AND REMANDED.

Not to be published in full.

No 35

Agenda No 11

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

49

C. R. RUNELLS (Complainant) Appellee,	Cases Consolidated
vs.	***
ADOLPH MUELLER, et al. (Defendant) Appellant.	Foreclosure
	of
HERBERT H. SONNEMANN, trading as C. G. Sonnemann & Co. (Complainant) Appellee,	Mechanic's Lien
	***
vs.	Appeal from the
ADOLPH MUELLER, et al. (Defendant) Appellant.	Circuit Court
	of
C. W. HIRSCHI (Complainant) Appellee,	Bond County
	***
vs.	Honorable Alfred D. Reiss, Judge Presiding.
ADOLPH MUELLER, et al. (Defendant) Appellant.	

284 I.A. 658

STONE, J.

This is an appeal from a decree of the Circuit Court of Bond County, Illinois, foreclosing mechanic's liens in favor of Oliver C. Tremblay, Walter S. Ward, Milo Kious, J. C. Carrillon, C. W. Hirschi, J. P. Juett, H. H. Sonnemann, and C. R. Runells, appellees, against Adolph Mueller, appellant.

Appellant's position is that there is no competent evidence in the record to support the decree finding the existence of a lien in any of the cases.

Certain of the facts are pertinent to all of the cases. The appellant owned the "Brooks Farm" where the improvements were made, and other lands, but resided in the City of Decatur, Illinois. The original improvements on the "Brooks Farm" were an eighteen room house and a barn. Appellant executed a contract for sale of the "Brooks Farm" in favor of W. B. Carlton and W. S. Helm, and let the purchasers

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

C. R. RUNELLE (Complainant) Appellee, vs. ADOLPH MUELLER, et al. (Defendant) Appellant.	Cases Consolidated *** Foreclosure of Mechanic's Lien *** Appeal from the Circuit Court of Bond County *** Honorable Alfred D. Reiss, Judge Presiding.
HERBERT H. SONNEMANN, trading as C. C. Sonnemann & Co. (Complainant) Appellee, vs. ADOLPH MUELLER, et al. (Defendant) Appellant.	
C. W. HIRSCHI (Complainant) Appellee, vs. ADOLPH MUELLER, et al. (Defendant) Appellant.	

STONE, J.

This is an appeal from a decree of the Circuit Court of Bond County, Illinois, foreclosing mechanic's liens in favor of Oliver C. Trombley, Walter S. Ward, Milo Fiona, J. C. Corrillon, C. W. Hirschi, J. P. Jaeth, H. H. Sonnemann, and C. R. Runelle, appellees, against Adolph Mueller, appellant.

Appellant's position is that there is no competent evidence in the record to support the decree finding the existence of a lien in any of the cases.

Certain of the facts are pertinent to all of the cases. The appellant owned the "Brooks Farm" where the improvements were made, and other lands, but resided in the City of Decatur, Illinois. The original improvements on the "Brooks Farm" were an eighteen room house and barn. Appellant executed a contract for sale of the "Brooks Farm" in favor of W. E. Darlton and W. S. Helm, and let the purchasers

into possession, but took no down payment, and did not record the contract. The contract, among other things, provided: "The vendees shall not make any improvements of any kind on the above described land, unless and until they have either obtained personal credit for the material and labor or provided in some satisfactory manner for the payment thereof so as to exempt and release the demised land from all materialmen's and mechanic's liens on account of said improvements.

"There shall no buildings be materially altered nor torn down until at least one-half of the purchase price of the said land has been paid and then only with the consent of the vendor. All such improvements to remain as a part of the said real estate."

Shortly after they went into possession, Carlton and Helm ordered extensive improvements made. Appellant, on learning of this, had a number of copies of a notice, which referred to the above contract and denied liability of himself or his land for the improvements, prepared and delivered to Charles E. Cochran, his farm manager. Cochran delivered all copies of the notice but one to J. F. Johnston, the real estate agent who conducted the above sale.

Johnston testified that on March 9, 1933, he served copies of these notices on Walter S. Ward, C. W. Hirschi, Oliver Tremblay, and others, and that he visited the premises several times, each time informing the parties working there that appellant was not responsible for the work. Cochran testified that he tacked the notice on the north side, east of the door of the house, and called attention to it.

There was no other pertinent testimony as to the nature of the agency of J. F. Johnston, except that once or twice he talked over the telephone to persons about the notices.

Charles E. Cochran testified that while he was the general farm manager of appellant he had no jurisdiction over the "Brooks Farm", because it had been sold. He

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Charles E. Cochran testified that while he was the general farm manager of appellant he had no jurisdiction over the "Brooks Farm", because it had been sold. He

visited the premises in March, April, May, and June, and had conversations with the men at work.

Appellant visited the premises on March 16, 1933, and on June 30, 1933. He testified that the improvements did not increase the value of the premises because they were not worth improving, and that improvement of the house on such property would not pay.

Some workers testified that no notice was ever posted and all of those involved in this appeal, who testified, denied receiving notice of the kind mentioned.

Oliver Tremblay, employed by one Clayton Riley, did carpentry work on the house in March and April 1933, and filed a claim for $33.90. It appears that when appellant visited the premises on March 16, 1933, he had conversations with Clayton Riley about the kind of wood originally in the house and the strength of beams under the floor. Mr. Cochran was with appellant at that time.

Walter S. Ward was hired by Carlton to do gutter work on the barn and house. He worked in April and May 1933, and filed his claim for $26.70.

Milo Kious,who worked from February to June 2, 1933, fixed the roads, lathed the house, cleaned the barn, hauled manure and put up hay. He filed a claim for $84.22. He saw Adolph Mueller, appellant, on the premises, and talked to Mr. Cochran. His claim includes work done by his two sons, putting up hay, hauling dirt, and working in the garden. The work done in putting up hay, cleaning the barn, and hauling manure is not work for which a lien could be established. He testified that he was paid to April first, and for putting up the hay, and that most of the work done was on the house. Nothing appearing to the contrary, we can assume that the Master properly separated these claims.

J. C. Carrillon was hired by Carlton and worked from May 16 to June 19, 1933. He did plastering, hung doors, built shelves, built screens and sashes, and worked on the fruit room. He filed a claim for $75.40.

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Appellant visited the premises on March 15, 1933, and on June 30, 1933. He testified that the improvements did not increase the value of the premises because they were not worth improving, and that improvement of the house on such property would not pay.

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Walter S. Ward was hired by Carlton to do gutter work on the barn and house. He worked in April and May 1933, and filed his claim for $26.70.

Milo Kious, who worked from February to June 2, 1933, fixed the roads, latched the house, cleaned the barn, hauled manure and put up hay. He filed a claim for $64.25. He saw Adolph Mueller, appellant, on the premises, and talked to Mr. Cochran. His claim includes work done by his two sons, putting up hay, hauling dirt, and working in the garden. The work done in putting up hay, cleaning the barn, and hauling manure is not work for which a lien could be established. He testified that he was paid to April first, and for putting up the hay, and that most of the work done was on the house. Nothing appearing to the contrary, we can assume that the Master properly apportioned these claims.

L. C. Carrillon was hired by Carlton and worked from May 16 to June 19, 1933. He did plastering, hung doors, built shelves, built screens and benches, and worked on the fruit room. He filed a claim for $75.40.

C. W. Hirschi was hired by Carlton and did electric wiring in April 1933. He filed a claim for $122.50.

J. P. Juett worked on the road, built a culvert and re-sodded the lawn. He was hired by Carlton and worked from February to May 1933. He talked with Cochran and he saw appellant when he visited the premises. He originally agreed with Carlton to work for his board and $50.00 a month. He filed a claim for $350.00.

H. H. Sonnemann furnished lumber which was delivered from March 14, 1933 to June 17, 1933 at the request of Carlton. Appellant was on the premises after some of the lumber was delivered, and Cochran was there from time to time during the period of delivery. This claim was filed for $641.26.

All of the claimants except C. R. Runells appear to have relied on the personal credit of the purchasers in the beginning.

This court on review will indulge in all reasonable presumptions in favor of the findings of the trial court. Where the testimony is conflicting or various reasonable inferences may be drawn from the facts testified to, this court will not upset the trial court's findings of fact based upon the testimony, or say that another inference should be drawn from facts than that adopted by the trial court; SADLER v. DRENNAN, 301 Ill. 335; KRABBENHOFT v. GOSSAN, 337 Ill. 396.

Charles Cochran was appellant's farm manager, as he and the appellant testified. Appellant first sent the notices to Cochran. Cochran did visit the premises and discuss the work with the men frequently. He did visit the premises with appellant. Appellant did pay attention to the work being done. The dates of the visits of Cochran and the dates on which various claimants did the work and furnished materials is somewhat vague. The only work which the uncontradicted evidence shows did not come to the attention of either appellant or Cochran, his farm manager, was the

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work done by C. R. Runells. The court might have found from the evidence that Charles Cochran's agency as general manager of appellant's farms extended to the "Brooks Farm". The testimony of Cochran to the effect that he no longer had jurisdiction over that farm because it was sold, is, in view of his other testimony, and that of appellant, more in the nature of a conclusion of the witness than a statement of fact. This court cannot say that the master was wrong or that the trial court erred in finding as to all claimants except C. R. Runells that appellant, either personally or through his farm manager knowingly permitted the improvements to be made.

C. R. Runells originally relied upon a contract with appellant alleged to have been made by Carlton as the agent of appellant. There is no evidence of this agency in the record except the statements of Carlton out of the presence of appellant that he was appellant's agent. Agency can not be proved by declarations of the agent made out of the presence of the alleged principal: PROCTOR v. TOWS, 115 Ill. 138; CITY OF CHICAGO v. MOYER, 343 Ill. 594; KUSEK v. ALLIED PACKERS, Inc., 246 Ill. App. 214. He also contends that appellant, through his agents, knowingly permitted the improvements. He furnished some wallpaper and laid linoleum, deliveries being made between May 14 and June 1, 1933. This work was ordered by Carlton, who, according to the testimony of Runells, represented himself as the agent of appellant. The account was charged to appellant. Neither Mueller, the appellant, nor Cochran knew about the work done or materials furnished by Runells, until after it was done. It appears that J. F. Johnston did not know of the order but saw men while they were in the process of laying the linoleum. This claim is for the sum of $1032.60.

Notice to an agent, in order to be binding upon the principal, must be acquired while the agent is acting within the scope of his authority and must have reference to a matter over which his authority extends: UNITED DISPOSAL CO.

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Notice to an agent, in order to be binding upon the principal, must be acquired while the agent is acting within the scope of his authority and must have reference to a matter over which his authority extends: UNIT D DISTRICT CO.

v. INDUSTRIAL COMMISSION, 291 Ill. 480 on 485; PEOPLE v. GULLBORG, 324 Ill. 538, on 539.

The record shows that Mr. Johnston was in the real estate business and that he acted as the agent of appellant in the sale of the land involved here. It shows that he was asked to deliver certain notices that the owner would not be liable for work done. The record shows that the general representative of appellant for his farms was Mr. Cochran. There is no evidence as to the scope of Mr. Johnston's authority, except the normal inference that being asked to do a particular job, i. e., deliver notices, sell real estate, etc., his authority was limited to that job. It clearly appears from the testimony that Mr. Johnston's employment by appellant was not continuous and that he had no general authority to act for appellant. There is, therefore, no evidence that Mr. Johnston had authority to approve the work being done or such authority that notice to him would be notice to appellant. Neither does it appear that Mr. Johnston induced by his action the laying of the linoleum or the continuance of the job after he saw it in progress. The men who laid it did not testify, and the statement of Mr. Johnston that when he saw men working he informed them of the notices he originally received is, in this instance, uncontradicted. It does not appear that anyone even remotely connected with appellant witnessed any of the other work done by Mr. Runells.

The decree provides that in the event the proceeds of sale are insufficient to pay the amounts provided in the decree, execution shall issue for the deficiency. Section 19 of the Mechanic's Lien Act of 1903 authorizes a decree in favor of a creditor for the balance due him if the proceeds of the sale are insufficient to satisfy his claim. This portion of the statute has been substantially in this form since 1874. That portion of the Act of 1903 which authorized the court to enter a money judgment in favor of a lien claimant in the amount found due where no lien

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was established was held unconstitutional in TURNS v. BRENKLE, 249 Ill. 394. Appellant's position is that this holding took away the authority of the court to enter a personal decree in mechanic's lien suits. However, the ruling in that case and those following it (BACKS v. NELSON CONSTRUCTION COMPANY, 271 Ill. App. 150; ILLINOIS MALLEABLE IRON COMPANY v. MODEL PLUMBING COMPANY, 176 Ill. App. 266; STANDARD OIL COMPANY v. KAPSCHUL, 276 Ill. App. 287) is confined to those cases where no lien is established. In the cases cited by appellees (BUMGARTNER v. HALL, 163 Ill. 136, and RUBENDALL v. TARBOX, 200 Ill. App. 260) the court decided that the decree in question was not a money decree.

No case has been cited nor has this court found any case where the specific question has been raised: whether there can be a deficiency decree in a mechanic's lien suit against an owner of property who has not contracted for the improvements made, but who is charged with notice of the improvements, where it appears that the lien claimant relied upon the personal credit of the purchaser of the improvements and not on the credit of the owner. Approaching this question as a new one it is the duty of this court to construe this statute strictly and not to unduly extend its operation as it is a statute in derogation of the common law.

The statute authorizes a deficiency decree in favor of a "creditor". It is logical to assume that such a decree should be against a "debtor". It frequently happens, as here, that the person who contfacts for the improvements is not the owner and no doubt the legislature intended to permit the entry of a decree against the one who made the contract where the proceeds of the sale were insufficient to pay the debt. In the case before us the owner of the property is not a debtor in the ordinary sense of the word. The lien claimant could not have recovered a judgment against him in a suit at law. We do not think that the legislature intended to establish a new rule of substantive law concerning

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The statute authorizes a deficiency decree in favor of a "creditor". It is logical to assume that such a decree should be against a "debtor". It frequently happens, however, that the person who contracts for the improvements is not the owner and no doubt the legislature intended to permit the entry of a decree against the one who is the owner of where the proceeds of the sale were insufficient to pay the debt. In the case before us the owner of the property is not a debtor in the ordinary sense of the word. The lien claimant could not have recovered judgment against him in a suit at law. We do not think that the legislature intended to establish a new rule of substantive law concerning

the formation of a contract. The court erred in providing for a deficiency decree against the appellant Adolph Mueller.

The decree of the Circuit Court of Bond County, Illinois, is therefore reversed with directions to dismiss the petition of C. R. Runells, appellee, for want of equity, and to strike that part of the said decree which provides for a deficiency decree against appellant, Adolph Mueller, in the event that the proceeds of sale are insufficient to pay the claims allowed.

Reversed and Remanded
with Directions

Not to be published in full

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